
December 1998

Final Report
prepared for



Surveyors Act 1967

A National Competition Policy Review

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Abbreviations

AAT	Administrative Appeals Tribunal of the Australian Capital Territory
ACT	Australian Capital Territory
CoAG	Council of Australian Governments
<i>CPA</i>	<i>Competition Principles Agreement</i>
CPD	continuing professional development
CSA	Consulting Surveyors Association, Canberra Division
DCDB	Digital Cadastral Data Base
IC	Industry Commission
ISA	Institution of Surveyors, Australia
ISA(CD)	Institution of Surveyors, Australia (Canberra Division)
MOU	Memorandum of Understanding
NCP	National Competition Policy
NSW	New South Wales
PI	professional indemnity
RIS	regulatory impact statement
SA	South Australia
<i>TPA</i>	<i>Trade Practices Act 1974</i>

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Chapter One

Summary and Overview

Chapter One

Summary and Overview

As part of its commitments under National Competition Policy (NCP), the Government of the Australian Capital Territory (ACT) undertook to review the *Surveyors Act 1967* against the guiding principle that the *Act*:

... should not restrict competition unless it can be demonstrated that:

- a) the benefits of the restriction to the community as a whole outweigh the costs; and
- b) the objectives of the legislation can only be achieved by restricting competition.

Competition Principles Agreement, Sub-clause 5(1).

Applying this guiding principle, this report is the product of:

- consultation with key stakeholders;
- desk research (including consideration of reform proposals emanating from the Chief Surveyor's 1996-97 review of the *Act*); and
- analysis of cadastral surveying NCP reviews and reform trends in other Australian jurisdictions.

1.1 The Need for Government Regulation

The rationale for government intervention

The first step in a NCP review is to determine the rationale for government intervention. All parties to the review were of the view that Government has an important role in ensuring that the integrity of the Cadastre — the system by which parcels of land are identified — is maintained.

Maintenance of a reliable Cadastre is important given the potential costs associated with imprecision that would be borne by:

- the ACT Government — given its obligation to guarantee land titles (the concept of indefeasibility of title);
- those who deal in land and who directly rely on surveys (eg, property owners, banks, etc); and
- the wider community — while the likelihood of financial contagion caused by inaccurate cadastral surveys is small, the costs (given the value of the land in the ACT, the financial arrangements that rely on certainty of title, and the value of improvements made to land) could be significant.

In essence, regulation to ensure the integrity of the cadastral system is a form of insurance. The direct beneficiaries of such insurance are people who own and have dealings in land, and the government, with the community at large indirectly benefiting.

1.2 Competitive Restrictions in the Current Regulatory Regime

The current regulatory regime

The current regulatory regime established by the *Surveyors Act* is relatively similar to that in most other Australian jurisdictions. The key features of the system are:

- a licensing regime with entry criteria based on educational prerequisites;
- ongoing oversight of surveyors by a board — the Surveyors Board — comprised largely of surveyors. The Board creates the *Survey Practice Directions* and is the body that enforces the provisions of the *Surveyors Act* and its *Directions*; and
- recognition of qualifications obtained from certain other jurisdictions.

Legislative concerns in light of National Competition Policy

The current regulatory framework displays a number of characteristics that require scrutiny under NCP. Principal amongst these are the:

- existence of a licensing regime that raises barriers to entry and could be used to exclude potential competitors;
- ability of industry participants, through the Board, to make regulations (the *Survey Practice Directions*) that could raise entry barriers or have other anti-competitive consequences; and
- ability of industry participants, through the Board, to discipline other surveyors on possibly anti-competitive grounds.

These restraints do not create significant costs ...

While these concerns are certainly present, it appears that these potential restraints are not a significant competitive impediment in practice.

By world standards the ACT has an abnormally high relative number of surveyors. While most work is done by a core group of licensed surveyors, there exists a significant number of small practices and sole practitioners who appear to provide a great competitive impetus and hence drive down average salaries. This suggests that, in practice, entry barriers are not significant.

Even the Industry Commission (IC) considered the regulation of surveyors to not be sufficiently significant to warrant inclusion in its modelling of the costs and benefits of the NCP package:

A number of other occupations were reviewed including:

- Land surveyors;
- Consulting engineers; and
- Quantity surveyors.

It was considered that the anti-competitive arrangements (if any) within each of these occupations were not significant enough for inclusion in this study.

Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms*, AGPS, Canberra 1995, p.120.

... but that does not mean that the regulatory regime cannot be enhanced

This does not mean, however, that the potential costs of the current regulatory arrangements are so insignificant that they can be ignored, or that there may be a more efficient and effective regulatory framework that can be employed in the ACT.

1.3 Improving the Efficiency and Effectiveness of the Regulatory Regime

The benefits of licensing of cadastral surveyors are overstated ...

The benefits of occupational licensing are most likely to arise when:

- purchasers are inexperienced (ie, not knowledgeable or do not make repeat purchases); or
- demand for the good or service produced can be significantly influenced by the supplier (eg, demand for medical services will tend to be a reflection of the medical advice given — ie, demand is supply driven).

Neither of these circumstances is a consistent feature of the surveying profession:

- purchasers of cadastral surveying services tend to have some knowledge of surveying (eg, builders) or be repeat purchasers (eg, lawyers). Even with respect to redefinition surveys (ie, surveys that are not seen by the Chief Surveyor), a number of parties suggested that in the majority of cases surveyors were recommended by lawyers or builders, or indeed hired by lawyers or builders rather than the ultimate consumer; and
- the cadastral survey has become somewhat commoditised and hence is less susceptible to being supply driven.

The other major factor that undermines the arguments for a licensing scheme is that regulation of the quality of people entering the cadastral surveying profession is no guarantee that the survey work will be of a particular quality. That is, licensing focuses on inputs but does not necessarily guarantee the quality of outputs. However, to some extent, threat of licence revocation somewhat focuses regulatory attention on outputs.

... but a minimal licensing system is appropriate to facilitate cross-jurisdictional movement of surveyors

While the benefits of licensing are overstated, alternative approaches have a number of limitations:

- negative licensing is not considered appropriate because of the risk to the Cadastre inherent in allowing at least one breach of standards; and
- co-regulation (and to a lesser extent certification) is not considered feasible because of the small size of the Institution of Surveyors, Australia (Canberra Division) — ISA(CD) — and the age of its membership.

While not convinced that licensing of surveyors is an effective mechanism to ensure the integrity of the Cadastre, some minimal form of licensing may be appropriate to ensure the effective operation of cross-border recognition of ACT surveyors under the national mutual recognition scheme.

Currently the licensing criteria is a tertiary surveying degree and post-graduation training and examination. Given other reforms proposed in this report there is scope to reduce this entry standard to a bare minimum — say, just the current required tertiary qualification — and rely on this being supplemented by industry certification if the industry so feels the need.

Instead of focusing on licensing, the regulatory regime should focus on output monitoring

The regulatory regime, rather than focusing on licensing, should focus on the outputs (ie, the quality of the survey work itself). This is the only way that the accuracy of the Cadastre can be ensured. While a quality monitoring program can be expensive, such costs are not likely to be unreasonable because:

- a screening process (similar to the current 13 point test administered to cover the requirements of both the *Districts Act* and the *Survey Practice Directions*) can be used to determine plans that may be based on faulty survey practices; and
- the small number of cadastral plans lodged in the ACT means that a random audit does not need to include many plans to cover a significant portion of the cadastral surveying undertaken in the ACT. The precise number of audits will need to be determined on a risk management basis; if indications suggested that problems were developing the number of audits could be increased.

In shifting the regulatory focus from licensing to performance it is probably appropriate to also shift the cost recovery focus from licensing. While there may still be some nominal charge for licensing, the bulk of recovery should come from:

- plan lodgement; and
- recovery of audit costs where a surveyor fails an audit.

The Surveyors Board is inappropriate ...

The composition of the Board and its operations raise a number of concerns under NCP and regulatory policy:

- the heavy reliance on peer judgement creates a potential conflict of interest;
- there is some industry dissatisfaction with the politicisation of non-surveyor appointments to the Board;
- the size and ongoing cost of the board appears out of proportion with the size of the cadastral surveying industry in the ACT. As the number of surveyors decreases in the ACT — possibly by 50 percent over the next decade — the cost per surveyor of maintaining the Board will have to increase unless the Board's costs are reduced;
- it is likely that there is under-enforcement because of the limited flexibility in current penalties and the fear that enforcement will escalate into expensive litigation.

... and its disciplinary functions can be streamlined

Following consideration of a number of options the preferred model for disciplinary action involves:

- the upgrading of the position of the Chief Surveyor to be an independent statutory position, reporting to the Minister;
- the Chief Surveyor would be responsible for undertaking investigations (where concerns arise from the auditing program or where a complaint is made);
- the Chief Surveyor would determine whether contraventions of the *Survey Practice Directions* or the *Act* have occurred and so penalise the contravening parties; and
- parties would be able to appeal to the Administrative Appeals Tribunal of the ACT (AAT).

For this proposal to be effective the current *Survey Practice Directions* will need to be restructured. As an audit program is likely to expose numerous minor contraventions of the *Survey Practice Directions*, the preferred approach is to establish a system of demerit points that are graded according to the importance of the *Survey Practice Directions* (ie, the penalty should be proportional to the risk to the Cadastre).

The move away from a statutory Surveyors Board is a significant proposal for change that does not appear to have the support of the industry. Given the recommendation to move towards greater auditing of plans, this option, provides more streamlined and effective enforcement with only a slight trade-off in transparency.

... and is not necessary to develop regulations

In addition to its disciplinary role, the Surveyors Board makes *Survey Practice Directions* (regulations) and assists in the development of policy. The profession suggests that this is an important function as it provides the profession with a chance to guide the rules governing the practice of cadastral surveying. However, a statutory board is not necessary to promote industry involvement.

... but industry input is still valued

If, as has already been suggested, the Surveyors Board is wound up, the Minister could make regulations (ie, *Survey Practice Directions*) on the advice of the Chief Surveyor. In such a case, the surveying industry could still be involved:

- at present a voluntary industry committee advises the Board on technical matters related to regulation. This committee could still advise the Chief Surveyor on proposals to create regulations;
- the Chief Surveyor could be required to prepare a regulatory impact statement (RIS) when proposing new *Survey Practice Directions*. Public consultation is an important part of a RIS; and

- as an organised lobby group, the surveying profession in the ACT would be likely to make known its concerns if *Survey Practice Directions* were proposed that were considered inappropriate.

Inter-jurisdictional issues

The surveying profession has long acknowledged the need to provide for the movement of surveyors across jurisdictions. With the development of the national mutual recognition scheme the *sui generis* approach to mutual recognition adopted in the *Surveyors Act* can largely be abandoned in place of the generic national mutual recognition scheme.

Moves to regulate on a more consistent and shared basis with New South Wales (NSW) are to be applauded as a logical development of the regulatory regime and the profession itself. Care needs to be taken, however, to ensure that cross-border arrangements are not used to lock in unnecessary or inefficient regulation.

Summary

To assist in understanding how this revised approach compares with current arrangements, Table 1.1 provides an overview of the current and proposed regulatory regimes.

Table 1.1

A Changed Regulatory Approach		
Regulatory Feature	Current Arrangements	Proposed Arrangements
Licensing	Yes	Yes
Licensing criteria	Tertiary education and two years of practical training	Tertiary education (the industry can move to certification of extra educational attainment)
Enforcement	Surveyors Board with appeals in the courts	Chief Surveyor with appeals in the AAT
Cost recovery	Government funding and licensing fees	Government funding, lodgement fees and recovery of costs associated with 'failed' audits
Auditing	Simple 13 point desk audit of all plans under the <i>Districts Act</i>	Simple desk audit of all plans and a more thorough random audit
Practise rules	Input dominated and prescriptive	Output dominated and flexible
Promulgation of the <i>Survey Practice Directions</i>	Surveyors Board	Minister, on the advice of the Chief Surveyor and following a regulatory impact statement
Mandatory professional indemnity	No	No
Mandatory continuing professional development	No	No

Source: The Allen Consulting Group

1.4 Recommendations

The approach outlined in the previous sections, and discussed more fully in the body of the document, is embodied in the following recommendations.

RECOMMENDATION ONE

Government regulatory oversight should be directed at ensuring that the integrity of the ACT's Cadastre is maintained.

RECOMMENDATION TWO

The ACT should retain a licensing scheme for surveyors who are involved in all cadastral boundary work (ie, including redefinition surveys).

<i>RECOMMENDATION THREE</i>	<i>A screening process should be developed by the Chief Surveyor to highlight those plans that may need further scrutiny to ensure their compliance with Survey Practice Directions.</i>
<i>RECOMMENDATION FOUR</i>	<i>Plans lodged with the Chief Surveyor should be audited if the screening process suggests that there may be underlying problems with the plan, and otherwise on a random basis.</i>
<i>RECOMMENDATION FIVE</i>	<i>The cost recovery emphasis should be moved from recovery through licence fees to the lodgement of plans.</i>
<i>RECOMMENDATION SIX</i>	<i>Where an audited plan 'fails' the full cost of the audit should be recovered from the registered surveyor who lodged the plan.</i>
<i>RECOMMENDATION SEVEN</i>	<i>An appropriate surveying degree from a tertiary institution should be retained as a criteria for licensing.</i>
<i>RECOMMENDATION EIGHT</i>	<i>The current post-graduate requirements administered by the NSW Surveyors Board should no-longer be mandatory for the attainment of a surveyors licence in the ACT.</i>
<i>RECOMMENDATION NINE</i>	<i>If industry believes that post-graduate training is necessary then it should be encouraged to develop certification procedures (either by piggy-backing on current post-graduate training requirements or developing its own).</i>
<i>RECOMMENDATION TEN</i>	<i>Licensing criteria related to the age and general character of potential surveyors should be removed from the Surveyors Act.</i>
<i>RECOMMENDATION ELEVEN</i>	<i>Sub-section 25(1) of the Surveyors Act should be amended to remove criteria not directly related to the practice of surveying. Particular criteria that should be abolished relate to the mental health of surveyors and their addictions.</i>
<i>RECOMMENDATION TWELVE</i>	<i>The Government should not legislate to require that continuing professional development training be mandatory to retain a surveyors licence.</i>
<i>RECOMMENDATION THIRTEEN</i>	<i>The Government should not legislate to require that surveyors hold professional indemnity insurance to retain a surveyors licence.</i>
<i>RECOMMENDATION FOURTEEN</i>	<i>The position of Chief Surveyor should be made an independent statutory position reporting to the Minister.</i>
<i>RECOMMENDATION FIFTEEN</i>	<i>The Chief Surveyor should be appointed on a fixed term contract.</i>
<i>RECOMMENDATION SIXTEEN</i>	<i>Amend the Surveyors Act to abolish the Surveyors Board.</i>
<i>RECOMMENDATION SEVENTEEN</i>	<i>The Board's disciplinary responsibilities should be transferred to the Chief Surveyor.</i>
<i>RECOMMENDATION EIGHTEEN</i>	<i>Appeals from decisions of the Chief Surveyor should be made to the Administrative Appeals Tribunal of the ACT.</i>
<i>RECOMMENDATION NINETEEN</i>	<i>Survey Practice Directions should be made by the Minister on the advice of the Chief Surveyor. Recommendations to the Minister should be accompanied by a regulatory impact that clearly states the level of public consultation undertaken in the development of the standards and stipulates the views of the major parties.</i>
<i>RECOMMENDATION TWENTY</i>	<p><i>Section 18 should be amended to:</i></p> <ul style="list-style-type: none"> • <i>reduce overlap with the domestic and trans-Tasman mutual recognition schemes;</i> <i>and</i>

- *provide the Chief Surveyor with the power to recognise qualifications gained in jurisdictions outside of Australia and New Zealand where such qualifications are considered sufficiently compatible with the ACT's.*

*RECOMMENDATION
TWENTY-ONE*

The Chief Surveyor should, in consultation with the industry, develop clear guidelines to assist in determining which overseas qualifications are compatible with the ACT's.

*RECOMMENDATION
TWENTY-TWO*

That the laudable efforts to increase harmonisation of the regulation of cadastral surveyors in the ACT and the NSW not be used to stifle the development of more efficient and effective regulatory structures.

*RECOMMENDATION
TWENTY-THREE*

The creation of a national profession should be encouraged as long as such a move is not used to entrench regulatory arrangements that are difficult to justify on NCP grounds.

2

Chapter Two

Context of the Review

Chapter Two

Background to the Review — National Competition Policy

This chapter describes the policy frameworks that underlie this review.

2.1 The Development of National Competition Policy

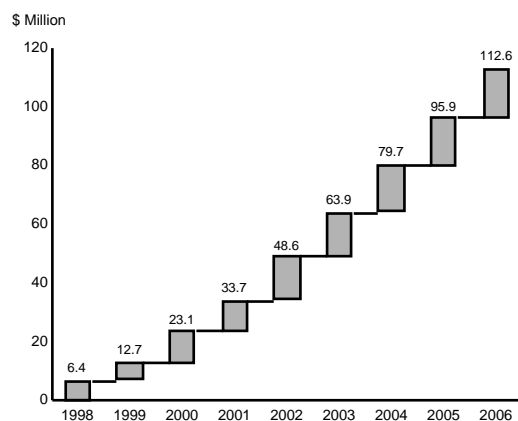
The inaugural Council of Australian Governments (CoAG) meeting commissioned the ‘Hilmer Committee’ to conduct an inquiry into the development of a more nationally focused approach to competition policy. The *Hilmer Report*¹ was presented to CoAG in August 1993, and formed a major input to micro-economic reform discussions for CoAG.

At the April 1995 CoAG meeting, the Commonwealth, State and Territory Governments agreed to implement a NCP reform agenda based on the *Hilmer Report*’s recommendations. As a result, three agreements were signed:

- the *Competition Principles Agreement (CPA)* established the principles agreed by governments in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulation, third party access to essential infrastructure facilities, the elimination of any net competitive advantage possessed by Government businesses, and the application of the competition principles to local government;
- the *Conduct Code Agreement* set out the processes for amendments to the competition laws of the Commonwealth, States and Territories; and
- the *Agreement to Implement the National Competition Policy and Related Reforms* set out the conditions for payment of Commonwealth ‘Competition Grants’ to the States and Territories. Payment of these grants requires the National Competition Council’s (NCC’s) advice that the States and Territories had made adequate progress towards meeting the achievement of micro-economic reform targets in a range of sectors. The ACT’s cumulative grants are shown in Figure 2.1.

Figure 2.1

Competition Policy Payments to the ACT (Cumulative)



Source: ACT National Competition Policy Unit, <http://www.competition.act.gov.au/what.html>.

2.2 Legislation Review and the Public Interest

The *Hilmer Report* described regulation by all levels of government as the greatest impediment to enhanced competition in many key sectors of the economy. It did, however, recognise that there may be a need for some government regulation when market failures occur. The *Hilmer Report* recommended:

- the reform of regulation that unjustifiably restricts competition; and
- any restriction on competition that is to remain must be clearly demonstrated to be in the public interest.

As a consequence of these observations, through the *CPA* all State and Territory Governments committed themselves to ensuring that new legislation does not impose undue competitive restrictions:

- (1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
 - a) the benefits of the restriction to the community as a whole outweigh the costs; and
 - b) the objectives of the legislation can only be achieved by restricting competition. ...
- (5) Each Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in subclause (1). ...
- (9) Without limiting the terms of reference of a review, a review should:
 - a) clarify the objectives of the legislation;
 - b) identify the nature of the restrictions on competition;
 - c) analyse the likely effect of the restriction on competition and on the economy generally;
 - d) assess and balance the costs and benefits of the restriction; and
 - e) consider alternative means for achieving the same result including non-legislative approaches.

Competition Principles Agreement, Sub-clauses 5(1), (5) and (9).

These sub-clauses acknowledge that competition is not an end in itself; that while, in general, the introduction of competition will deliver benefits to the consumer, there are situations where community welfare will be better served by not effecting particular competition reforms. That is, competition is to be implemented to the extent that the benefits that will be realised from competition outweigh the costs.

NCP recognises that where anti-competitive behaviour is acceptable to achieve a public good, there must be a transparent process for assessing the balance between benefit and costs, and the behaviour must be subject to review.

Sub-clause 1(3) of the *CPA* provides for considerations other than strictly economic criteria in assessing public benefit in circumstances where, on balance, there is a net benefit for the community. Sub-clause 1(3) sets out the circumstances in which the weighing up process is called for, and also some of the factors which need to be taken into account in making the decision:

Without limiting the matters that may be taken into account, where this Agreement calls:

¹ The Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993.

(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or

(b) for the merits or appropriateness of a particular policy or course of action to be determined; or

(c) for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

(a) government legislation and policies relating to ecologically sustainable development;

(b) social welfare and equity considerations, including community service obligations;

(c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

(d) economic and regional development, including employment and investment growth;

(e) the interests of consumers generally or of a class of consumers;

(f) the competitiveness of Australian businesses; and

(g) the efficient allocation of resources.

‘Public interest test’ (sometimes called the public benefit test) is a shorthand expression to describe the interplay of sub-cl.1(3), 5(1), 5(5) and 5(9) of the *CPA*.

The NCC has stated that:

A central feature of the National Competition Policy is its focus on competition reform ‘in the public interest’. In this respect, the guiding principle is that competition, in general, will promote community welfare by increasing national income through encouraging improvements in efficiency. ...

The aim in applying s.1(3) is to assess any special treatment in a transparent and consistent manner, with the benefits and costs of particular anti-competitive behaviour subject to public scrutiny.

National Competition Council 1996, *Considering the Public Interest under the National Competition Policy*, AGPS, Melbourne, pp.2 & 8-9.

The NCC emphasises that sub-cl.1(3) is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions, while not excluding consideration of any other matters in assessing the public interest.²

It is important when considering whether the public interest is served by competitive restrictions to identify any public detriment that may arise from competitive restrictions. Primary emphasis is on those detriments which affect economic efficiency and which may take the form of:

- a reduction in the number of effective competitors (for example, as a consequence of excessively prescriptive regulation);
- increased restrictions on entry; and
- constraints on competition by market participants affecting their ability to innovate effectively and conduct their affairs efficiently and independently.

² This approach was re-affirmed by the House of Representatives Standing Committee on Financial Institutions and Public Administration — House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, *Cultivating Competition: Report of the Inquiry Into Aspects of the National Competition Policy Reform Package*, AGPS, Canberra, June, p.10.

Furthermore, it is also important to note that, even when a net public benefit is established, it must be demonstrated that the benefit can only be achieved by restricting competition.

2.3 Creating ‘Better’ Regulation

One of the implicit goals of the legislation review process is to create ‘better’ regulation.³ This may mean:

- greater regulation if pro-competitive frameworks need to be established or market imperfections corrected; or
- less regulation where market forces provide appropriate outcomes.

This focus on the appropriateness of regulatory regimes rather than the traditional black and white issues of ‘more’ or ‘less’ regulation has been reinforced by the Deputy Executive Director of the National Competition Council (NCC):

it needs to be emphasised that the NCP legislation review program is not about deregulation for deregulation’s sake, nor that it allows no room for (so-called) non-economic considerations, and nor that it sees no role for government. ...

Rather, the NCP legislation review program is about:

- ensuring that, where government does regulate, that regulation is necessary, effective and well designed;
- ensuring that regulation is not used to prop up the incomes and conditions of vested interest groups, at the expense of the rest of us; and
- replacing the ‘maximum visible regulation’ of the past with ‘minimum effective regulation’, which can pass the test of ‘net public benefit’.

So we are talking about reorienting and refining, rather than rejecting, the regulatory role of government.

Cope, D. 1998 ‘National Competition Policy: Rationale, Scope and Progress, and Some Implications for the ACT and the Role of Government’ at the *ACT Department of Urban Services’ Summer Seminar Series*, Canberra, 20 March, 17. Emphasis in original.

This approach to regulatory reform is consistent with the work conducted by the ACT’s Red Tape Task Force. The Task Force, convened in 1995, consisted of Government and business representatives with the aim of reporting on regulatory processes where ‘red tape’ appears to impose unnecessary burdens, cost or disadvantages to the business sector.

³ See sub-cl.5(9) of the *CPA*.

3

Chapter Three

The Cadastre and Cadastral Surveying in the ACT

Chapter Three

The Cadastre and Cadastral Surveying in the ACT

This chapter provides a brief overview of the current practice of cadastral surveying in the ACT.

3.1 The Cadastre

A cadastre is a parcel based and up-to-date land information system containing a record of interests in land (eg, rights, restrictions and responsibilities).⁴

The ACT Cadastre is based on an area of land known as a Block (commonly referred to as a 'parcel' in other jurisdictions). The *Districts Act* requires the Minister to divide the ACT into:

- Districts and Blocks for rural areas; and
- Districts, Divisions, Sections and Blocks for urban areas.

In the ACT cadastral (land parcel) data is used to define property boundaries, roads and road boundaries, administrative boundaries, and so on. In the ACT cadastral data is represented in the Digital Cadastral Data Base (DCDB).⁵

As the Government guarantees titles issued to leaseholders (the concept of indefeasibility of title), the risks associated with the guarantee will depend on the integrity of the supporting cadastral system.

3.2 The Profession

A cadastral surveyor defines the size, location and boundaries of each land parcel (Block) in the Cadastre.

Cadastral surveying is a declining sector of the ACT economy:

- as can be seen in Figure 3.1, there has been a decline in the number of survey plans lodged with the Chief Surveyor over the past decade; and

⁴ International Federation of Surveyors, *Statement on the Cadastre*. International Federation of Surveyors, 1995.

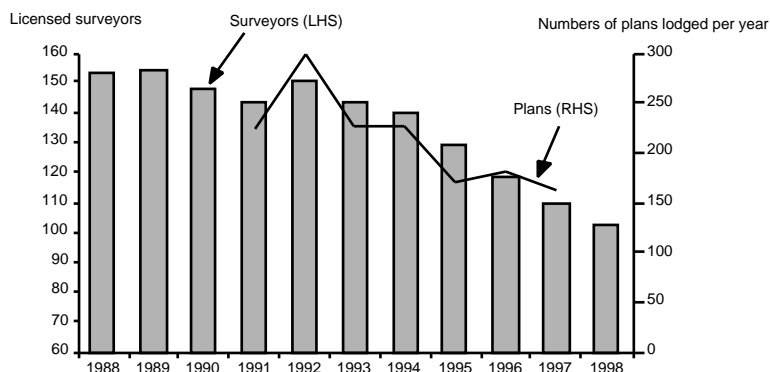
⁵ The ACT is one of the few places in the world where the DCDB agrees with the legal tenure boundaries (generally to within a few centimetres). The ACT DCDB was commenced in 1972 by the Australian Survey Office within the Commonwealth Government, and then transferred to the ACT in 1989 as part of the introduction of self-government for the ACT. In 1992 the DCDB data was migrated from the in-house-developed software to Graphic Design System and named ACTMAP. All of the cadastral data (property boundaries, road boundaries) in ACTMAP were input to the system using survey calculation to ensure accuracy. All blocks of land created since 1992 have been captured from digital data provided by surveyors.

- the number of redefinition surveys — ie, cadastral surveys, such as may be done for a house sale, but which are not lodged with the Chief Surveyor — are more difficult to estimate given that they do not pass through official hands. It is reasonable to suggest, however, that the number of redefinition surveys is somewhat correlated with construction in the ACT. Given the decline in residential construction in the ACT over the last decade,⁶ it is reasonable to assume that the number of redefinition surveys is also declining.

As one would expect, with declining work, there has been a corresponding decline in the number of registered cadastral surveyors. The current number of surveyors is 98, but unless a major expansion of Canberra occurs this number can be expected to decline over the next decade. Indeed, the CSA suggested that the number of surveyors may decline by as much as 50 percent.

Figure 3.1

Declining Plan Lodgement and Licensed Surveyors

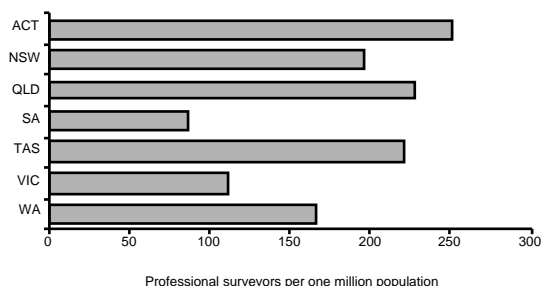


Note: Surveyor numbers are at 30 June
 Source: Derived from Annual Reports and the Chief Surveyor

While the number of licensed surveyors in the ACT is declining; in comparison to other Australian jurisdictions, however, the ACT has a high relative number of cadastral surveyors — Figure 3.2.

Figure 3.2

Number of Professional Surveyors Per One Million Population



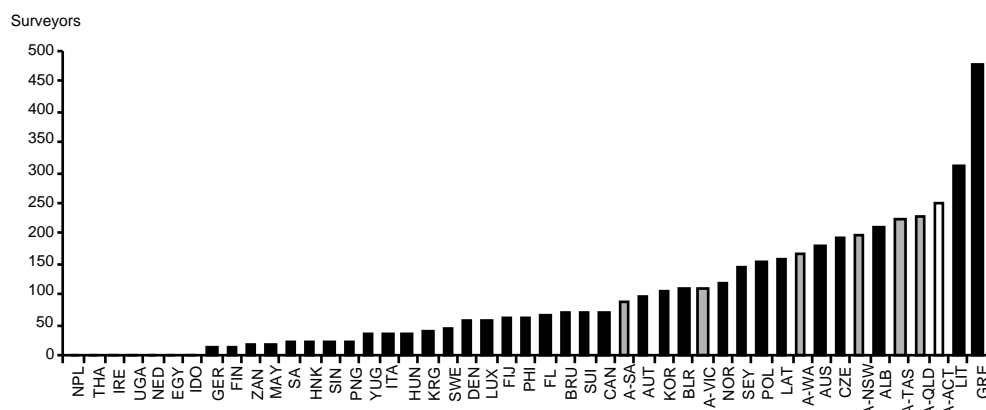
Source: Derived from data supplied by Steudler as used in Steudler, Williamson, Kaufmann & Grant, "Benchmarking Cadastral Systems" (1997) 42(3) *The Australian Surveyor* 87.

⁶ See Australian Bureau of Statistics, *Australian Capital Territory in Focus 1997*, Cat. No. 1307.8, 1997, p.135.

Indeed, the proportion of cadastral surveyors in the ACT is high in comparison to international standards — Figure 3.3.

Figure 3.3

Number of Professional Surveyors Per One Million Population



Source: Derived from data supplied by Steudler as used in Steudler, Williamson, Kaufmann & Grant, "Benchmarking Cadastral Systems" (1997) 42(3) *The Australian Surveyor* 87.

Note: The Australian jurisdictions are abbreviated as 'A-#' with the standard state and territory abbreviation in place of '#'.

It is likely, however, that the official number of registered surveyors overstates the effective number of surveyors. The ACT Chief Surveyor suggests that he receives plans from only about 40 of the surveyors registered in the ACT, with most only lodging a few plans a year.

The other 60 or so licensed surveyors tend to be smaller (often single person practices) and more opportunistic, pricing closer to marginal cost, and hence providing a competitive fringe that disciplines the pricing of the core group of cadastral surveyors.

It is likely that the number of registered surveys will decrease significantly over the next ten years. With an average age of the ISA(CD) members in the mid to later 50s, the Consulting Surveyors Association, Canberra Division (CSA) suggested that the number of registered surveyors will decline by 50 percent or more over the next decade. Even if this forecast is correct, the number of surveyors would only decline to a number around the world average — see Figure 3.3.

This decline may be exacerbated by the consumer trend to demand 'one-stop-shops' for professional services.⁷ Such a trend tends to promote the creation of larger firms and hence industry rationalisation.⁸

While current surveyors correctly point to the low average salaries in the ACT (both in comparison to Australian and overseas jurisdictions — see Figures 3.4 and 3.5), the expected future decline in surveyor numbers will be likely to have the effect of raising average surveying incomes because:

- the available work will be shared amongst fewer surveyors; and

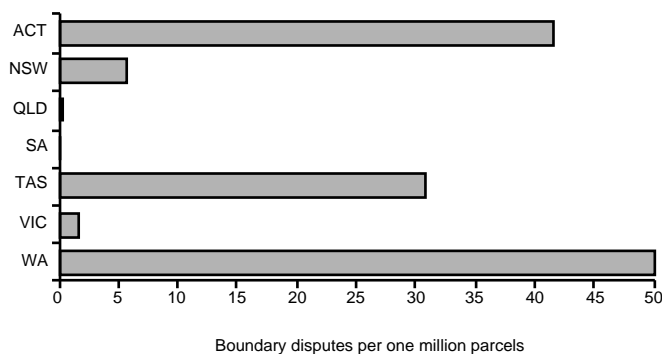
⁷ See The Allen Consulting Group, *The Australian Service Sector Review*, Australian Coalition of Service Industries, Melbourne, 1998.

⁸ The move away from small firms and sole practitioners to larger corporate structures provides an added level of regulatory oversight. As firms have a corporate reputation to maintain, in addition to government oversight, firms will tend to monitor the work of its surveyors.

One measure of accuracy is the annual number of boundary disputes — the lower the number of disputes the greater the presumed accuracy of cadastral surveys underpinning the cadastral system. While data from an international benchmarking suggests that the ACT's cadastral system is much more accurate than the world average,⁹ Figure 3.6 suggests that, adjusted for size differentials, the ACT is at the upper end of disputes in Australia.

Figure 3.6

Annual Number of Boundary Disputes Per One Million Parcels



Source: Steudler, Williamson, Kaufmann & Grant, "Benchmarking Cadastral Systems" 1997 42(3) *The Australian Surveyor* 87 at 92.

Note: The average values are weighted with the number of parcels.

The findings represented in Figure 3.6, however, are disputed by the Chief Surveyor:

The ACT's cadastral system is much more accurate than the world average and also well ahead of other Australian jurisdictions. This is a result of the relatively late start (1911) for surveying in the ACT and the effort made by early surveyors coupled with the resources provided by the Commonwealth. This legacy has resulted in the accurate cadastre ... This firm foundation linked to the small size and low number of practitioners also results in minimal disputes.

[Figure 3.6] is misleading and based on inaccurate data. The questionnaire from which this figure was developed was badly worded and wrongly interpreted by respondents. As defined by other jurisdictions there are virtually no boundary dispute sin the ACT. I do not know of a single court case.

Menzies, *The Allen Consulting Group Draft Report on National Competition Policy Review of Surveyors Act 1967 — Further Comments*, 14 December 1998, p.1.

Survey costs are difficult to estimate across jurisdictions and across different survey conditions. For example, while the benchmarking exercise referred to above tends to show that cadastral surveying in the ACT is relatively expensive in comparison to other Australian jurisdictions. The ISA(CD) suggests that these cost comparisons are flawed because the ACT cost base includes the costs associated with two levels of government whereas costs claimed in other jurisdictions ignore costs associated with local government requirements.

⁹ Steudler, Williamson, Kaufmann & Grant, "Benchmarking Cadastral Systems" 1997 42(3) *The Australian Surveyor* 87 at 92.

4

Chapter Four

Regulation of Cadastral Surveying

Chapter Four

Regulation of Cadastral Surveying

This chapter explores the rationale for regulating cadastral surveying and briefly highlights a number of NCP concerns that arise from the current regulatory arrangements.

4.1 When is Regulation Appropriate?

The Victorian *Guidelines on the Review of Legislative Restrictions on Competition* note that government interventions in markets should generally be restricted to situations of market failure.¹⁰

Market failures may arise under a number of conditions including:

- *public goods* — will tend to be under-produced because they are non-excludable (ie, people who have purchased the good cannot stop others using it up) and non-rivalrous (ie, the good is not used up with use). Common examples include aspects of the natural environment and national defence;
- *externalities* — positive or negative impacts of market transactions which are not reflected in prices, and so lead to non-optimal levels of production and consumption;
- *natural monopolies* — where the costs of establishment, resources or infrastructure mean that setting up competition is socially wasteful. Because a natural monopoly is socially optimal but not necessarily in the interests of all players in the market, governments may decide to regulate in the public interest; and
- *information asymmetries* — where information is not evenly distributed throughout the community.

Other reasons why governments have tended to regulate or intervene in markets include:

- *the desire for universal goods and/or services* — community service obligation (CSO) services such as concessions to essential services for low income households is an example where governments have deemed it necessary to 'interfere' with the market;
- *allocation of public resources* — some industries base their operations on a public resource of limited capacity, so that a public agency must intervene to ration out that resource; and
- *protection of consumers, employees and the environment* — this is intended to overcome problems of externalities and imperfect information in the market place.

These three objectives may or may not be related to a market failure.

Responding to these diverse concerns, the objectives of existing legislation are sometimes obscure, mixed or conflicting, or have been broadened over time by particular interest groups. A comprehensive list of the nature of existing regulations and the market failures (if any) they are designed to address is essential to any assessment of costs and benefits.

¹⁰ Department of Premier and Cabinet, *Guidelines for the Review of Legislative Restrictions Competition*, Victorian Government, Melbourne, 1996.

4.2 The Rationale for Regulating Cadastral Surveying

As noted in section 4.1, the regulation of surveyors should be tailored to correct for any market failure which might otherwise occur.

4.2.1 Protection of the Cadastre's Integrity

The Cadastre's integrity (ie, its reputation rather than the actual database) has some of the characteristics of a public good. In particular, consumers can free-ride on the good reputation of the cadastre, and may be tempted to down-play the need for a complete (ie, expensive) cadastral survey because they believe that plans currently registered are likely to be appropriate.

Goods with public good characteristics tend to be under-produced if there is not some form of government intervention. Such under-production, and the ensuing reduction in the integrity of the Cadastre would have widespread implications for the community and the economy:

- for the purchaser, there must be confidence that the details specified on the survey plan and those details in the Certificate of Title correspond to those actually marked on the ground;
- for the wider community, everybody must be certain in the knowledge of who owns the land, what other parties have an interest in the land and where it is located; and
- for the Government, the Cadastre also supports the public administration of land. The information in the Cadastre can be used for the formulation, implementation and monitoring of land policies, such as those concerning land redistribution, land consolidation, land acquisition and allocation, and land markets.

Indeed, expectations of positional certainty are fundamental to the fair, transparent and secure administration of land. The protection of frameworks necessary to ensure such property rights is seen as fundamental to the functioning of the economy:

Much of the regulation in our society is accepted as essential. For example, there is an unquestioned need for a body of law which protects traditional property rights, enforces contracts and prohibits fraud, and generally underpins the fair and efficient working of the market economy.

Industries Assistance Commission, *Regulatory Impediments to Industry Adjustments*, Canberra, AGPS, 1986, p.4.

4.2.2 Minimising Externalities

By its very role in distinguishing boundaries, the practice of cadastral surveying involves at least two parties: the parcel being defined and its adjoining land. The regulation of cadastral surveying is designed to minimise any externalities which might arise from the definition of a parcel of land.

It is said that surveyors have a hierarchy of responsibilities and should practice this means in the interests of:

- the Government and the wider community;
- the owner of the adjoining land; and then
- the paying client.

This hierarchy is said to ensure that the surveyor minimises externalities to the community and the adjoining land holder. It also ensures that the surveyor is fair and impartial, and the public can maintain confidence and trust in the practise of cadastral surveying.

In a way, regulation to minimise negative externalities can best be described as relying on the precautionary principle — regulate because it is better to be safe than sorry.¹¹ That is, because some of the consequences of an inaccurate cadastral system will not be experienced for many decades, the risks of getting the regulatory regime wrong now are likely to be significant and grow over time (because externalities will multiply) and therefore the government has a responsibility to eliminate uncertainty by reducing such longer-term risks. While uncertainty and risks may justify regulation, a cautionary note is necessary about extending such a regulatory justification beyond its reasonable limits:

In uncertainty justifies regulation, there remains the question of how much regulation should ensue. The precautionary principle seems to call for the elimination of uncertainty, reducing any risk to zero. Yet a zero risk is both functionally impossible and practically disastrous.

Cross, “Paradoxical Perils of the Precautionary Principle” (1996) 53 *Wash & Lee L Rev* 851 at 859.

4.2.3 Consumer Protection

Every party consulted expressed the regulatory objective in terms corresponding to section 4.2.1 and 4.2.2.

Occasionally, however, in discussions it became apparent that some of the parties also viewed the licensing of surveyors under the *Surveyors Act* as a form of consumer protection. That is, there is a role for government to regulate to provide consumers with appropriate signals about the quality of the surveyors that they are contemplating employing.

This rationale does not seem appropriate to justify the regulation of surveyors. Regulation of an occupational group as a form of consumer protection may be appropriate when

- purchasers are inexperienced (ie, not knowledgeable or do not make repeat purchases); or
- demand for the good or service produced can be significantly influenced by the supplier (eg, demand for medical services will tend to be a reflection of the medical advice given — ie, demand is supply driven).

Neither of these circumstances is a consistent feature of the surveying profession:

- purchasers of cadastral surveying services tend to have some knowledge of surveying (eg, builders) or be repeat purchasers (eg, lawyers). Even with respect to redefinition surveys (ie, surveys that are not seen by the Chief Surveyor), a number of parties suggested that in the majority of cases surveyors were recommended by lawyers or builders, or indeed hired by lawyers or builders rather than the ultimate consumer; and
- the cadastral survey has become somewhat commoditised and hence is less susceptible to being supply driven.

¹¹ See Perring, “Reserved Rationality and the Precautionary Principle: Technological Change, Time and Uncertainty in Environmental Decision Making” in Costanza (ed), *Ecological Economics: The Science and Management of Sustainability*, Columbia University press, New York 1991, pp.153-166.

As a result, while there may be some increased consumer protection as a result of the regulation of cadastral surveyors, consumer protection *per se* should not be viewed as the rationale for regulating the surveying profession.

RECOMMENDATION ONE

Government regulatory oversight should be directed at ensuring that the integrity of the ACT's Cadastre is maintained.

4.3 The Current Regulatory Regime and NCP Concerns

A number of features stand out when describing the regulatory regime put in place by the *Surveyors Act*.

- a licensing regime — entry criteria are based on formal tertiary qualifications and post-tertiary training at the workplace;
- a close working relationship with NSW — the NSW Surveyors Board undertakes licensing examinations on behalf of the ACT, and there are arrangements in place to provide for discounts if a surveyor licences in both jurisdictions;
- oversight by the Surveyors Board — the Board, composed mostly of surveyors, creates the *Survey Practice Directions* and is the enforcement body;
- there is no requirement for mandatory professional indemnity or continuing professional development (CPD) — these have, however, been given serious consideration in recent years;
- minimal scrutiny of plans — while the Chief Surveyor applies a 13 point checklist to plans to ensure compliance of the plans with the *Districts Act*, there is no systematic assessment of whether surveyors have complied with the *Survey Practice Directions*; and
- recognition of capabilities from other jurisdictions — the *Surveyors Act* provides a mechanism whereby the Surveyors Board can recognise qualifications gained in other jurisdictions and hence automatically grant a surveyors licence in the ACT.

It is clear from studies of the regulation of the professions that major negative competitive consequences are most likely to come from:

- structural regulations which:
 - regulate entry into the market (including the imposition of educational and competency standards, licensing and certification requirements and restrictions on entry by foreign professionals and para-professionals);
 - define the field of activity reserved for licensed or certified professional practitioners;
 - separate the market functionally into discrete professional activities (including those performed by accredited specialists such as insolvency practitioners, barristers and medical specialists); and
 - impose restrictions on the ownership and organisation of professional practices.
- conduct regulations which:
 - limit the fees which professionals may charge or require the application of fee scales for particular professional services;
 - prohibit certain kinds of advertising, promotion or solicitation of business by professional practitioners; and

- specify professional and ethical standards to be observed by, and disciplinary procedure to apply to, professional practitioners.¹²

Clearly, some of the regulatory features that are likely to raise at least *prima facie* concerns include:

- the existence of a licensing regime (and particular licensing criteria) that may be used to exclude potential competitors;
- the ability of industry participants, through the Surveyors Board, to make regulations; and
- the ability of industry participants, through the Surveyors Board, to discipline surveyors.

These NCP concerns need to be viewed in the context of a changing marketplace: a shrinking profession in the ACT; trends to larger surveying corporations; and improvements in technology.

¹² See Fels, “Can the Professions Survive under a National Competition Policy? — The ACCC’s View” presented at *Competition Law and the Professions*, 11 April 1997.

5

Chapter Five

Licensing of Surveyors

Chapter Five

Licensing of Surveyors

5.1 The Costs and Benefits of the Current Licensing Regime

The broad types of costs and benefits associated with occupational licensing are now well established. In general:

The regulation of occupations can reduce the likelihood of fraud by unscrupulous practitioners, and can address information failures by providing greater assurance to non-contracting parties who may be incidentally affected by decisions taken on professional advice. Indeed, the main rationale for the registration of occupations is to correct information failures.

Registration can, however, restrict competition by limiting the number of people who are registered to provide a good or service. This can enhance their market power, allowing them to charge higher prices to the disadvantage of consumers.

Office of Regulation Review, *Impact of Mutual Recognition on Regulations in Australia*, AGPS, Canberra, p.14.

The key is to determine the relative weights associated with the costs and benefits of such regulation. A broad assessment of the benefits, or otherwise, of licensing are considered in this chapter, with further detail on licensing criteria discussed in Chapter Six.

5.1.1 Possible Costs Associated with Licensing

Costs associated with a licensing regime may broadly be classified as:

- *administrative and compliance costs*, both for industry and for those who enforce the regulation; and
- *costs to economic efficiency* which arise from any restriction on competition.

These possible costs are discussed in turn.

Administrative and Compliance Costs

Surveyors incur direct financial costs in complying with licensing requirements imposed by the *Surveyors Act*. The surveyors' fees and other expenditure required for compliance in 1997-98 is shown in Figure 5.1 (next page).

In addition, individual surveyors can suffer interruption to their business due to licensing related restrictions that restrict their ability to either forgo work or work at lower rates (eg, while undertaking post-graduate training).

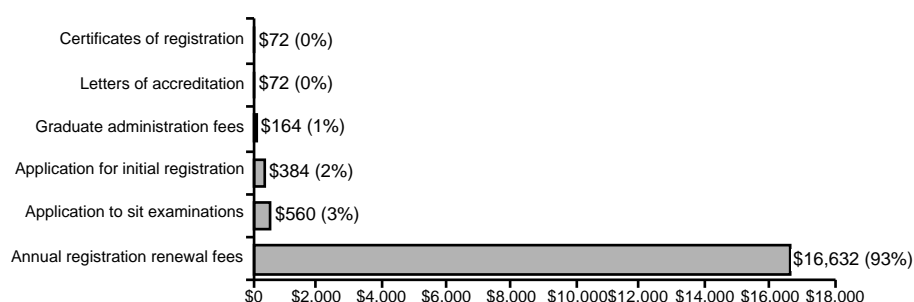
The ACT Government also incurs direct financial costs in administering the licensing regime for surveyors:

Payments made to members and examiners in accordance with the Remuneration Tribunal's Determinations totalled \$16,454.20. Other expenditure totalled \$2,883.31.

Department of Urban Services, *Annual Report 1997-98*, p.171.

Given that these administrative costs are closely aligned with the fees generated these costs are not significant.

Figure 5.1

Fees Collected by the Surveyors Board (1997-98)

Source: Department of Urban Services, *Annual Report 1997-98*, p.172.

There is a range of other costs, however, that are also related to the regulation of cadastral surveying. For example, at least part of the Chief Surveyor's salary should be attributed to cadastral-related regulation of surveyors. Also, the annual salary costs associated with plan examination, based on salary equivalent to one and a half full time employees, is just under \$75,000.¹³ It is important to note, however, that plan examination is not directly related to the *Surveyors Act*. It is carried out to enable:

- the Chief Surveyor to certify compliance with the *Districts Act*; and
- the Registrar General to register the plans and issue titles based on the information in the plans.

Some of the administrative costs of examinations have been reduced by giving responsibility for licensing examinations to the NSW Board of Surveyors. The costs have not been totally removed, however, because the ACT Chief Surveyor continues to assist in undertaking examinations.

Costs to Economic Efficiency

Licensing regimes have, at least in theory, an impact on economic efficiency because they distort underlying supply decisions.

A simple supply and demand model for the supply of surveying services shows the potential efficiency costs associated with a licensing regime — see Figure 5.1 (next page).

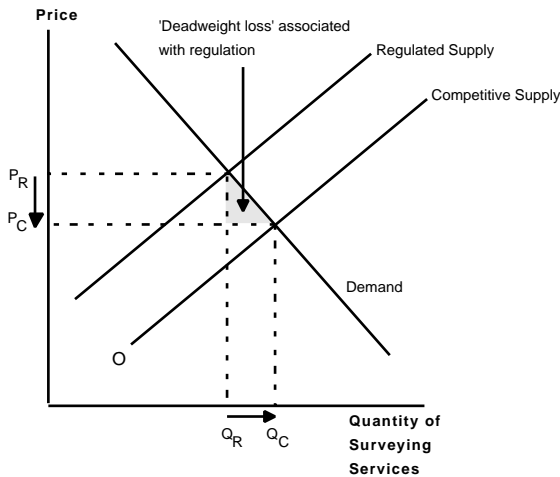
The current market equilibrium point exists with Q_R surveying services supplied at price P_R (ie, prices and quantities under licensing regulation). If the licensing regime is removed the supply curve will shift to the right, because entry is easier, creating an expansion of output (Q_C minus Q_R) at a lower price (P_C).

The move from licensing to free entry removes the 'deadweight loss' associated with licensing. The shaded triangle in Figure 5.2 represents a loss (ie, not a transfer between two groups) in efficiency because there are a number of consumers who are willing to pay above the competitive market price (P_C) but below the regulated market price (P_R), but are denied surveying services because licensing creates a minimum price of P_R .

¹³ It is unusual to consider the total costs of employment (ie, salary, on-costs, accommodation, etc) to be three times the salary component.

Figure 5.2

The Economic Impact of Occupational Licensing



Source: Derived from Logan, Milne and Officer, "Competition Policy in Regulated Markets" in James (ed), *Regulating for Competition? Trade Practices Policy in a Changing Economy*, Centre for Independent Studies, Sydney, 1989, pp.115-139 at p.127.

At least in the first instance (ie, before taking into account potential quality concerns), the potential winners from the removal of licensing requirements are:

- consumers of surveying services — who would expect to pay lower prices;
- potential surveyors — who would find it easier (ie, less costly in time and effort) to enter the ACT market; and
- The actual height of these barriers, and hence the impact on efficiency, is discussed in Chapter Six.

5.1.2 Potential Advantages of Licensing

The main benefit claimed for licensing is that the establishment of clear entry criteria ensures that qualified surveyors will provide surveying services to a sufficient quality standard. As a result it is assumed that the community and the state are provided with increased certainty of the accuracy of land and property boundary definitions. Furthermore, the threat of license revocation can be used as an enforcement tool in ensuring the maintenance of professional standards in authorised survey work.

This logic — by attempting to control the quality of inputs into the production of professionals' services, licensing attempts to improve the quality of these services — suffers from one fundamental problem; it is not clear whether or not output quality will increase as a result of restrictions on inputs. Moreover, even if licensing is effective in insuring that entrants are qualified, the continued competence of existing members of the profession is not necessarily guaranteed.¹⁴

¹⁴ For example, many surveyors practising today in the ACT received their licences 25 years ago when the technological understanding need to get a licence was substantially lower than today.

The theoretical literature indicates that input restrictions will not necessarily increase the quality of professionals' services because many factors (not all of which are controlled by licensing) affect the quality of service rendered.¹⁵ Since the surveyor is free to adjust the level of inputs which are not controlled by licensing (eg, the amount of time a surveyor spends in the field or the use of non-surveyors in preparing plans, etc), licensing criteria does not necessarily imply that quality will increase.¹⁶

While licensing may not ensure quality, it may (ironically) facilitate the cross-jurisdictional practice of surveyors. The existence of a licensing scheme allows surveyors licensed in the ACT to operate interstate without needing to undergo the full test in the other jurisdictions — this is discussed more fully in Chapter Eight. Were the ACT to abandon licensing, it is likely that ACT licensed surveyors would need to meet all the standards of licensing for each jurisdiction in which the surveyor wanted to work. For example:

- with a licensing regime in the ACT — a licensed ACT surveyor can rely on the mutual national recognition regime and *sui generis* mutual recognition provisions in the surveying legislation across Australia to obtain a license in all other Australian jurisdictions (once the licensing fees are paid); but
- without a licensing regime in the ACT — it is likely that other jurisdictions would withdraw recognition of the competency of ACT surveyors and so would require that the full licensing criteria are met. For example, if an ACT surveyor wanted to operate in WA he or she would have to undertake post-graduate training for at least 12 months. The applicability of the national mutual recognition scheme to ACT surveyors would also be placed in doubt because the mutual recognition scheme bases recognition on the existence of a licensing scheme.

Thus, while it is unlikely that the benefits of licensing directly relate to the protection of the Cadastre's integrity, it appears as though some form of licensing may assist in the free movement of surveyors across jurisdictions.

5.2 Alternatives to Licensing

This section explores a number of different approaches that could be employed in place of, or possibly in conjunction with, licensing.

5.2.1 Self-Regulation

Industry self-regulation describes the type of actions or procedures — ranging from simple statements of intent to rules of professional conduct — that the profession determines to be appropriate conduct.

Amongst a number of benefits associated with self-regulation, see Table 5.1, two stand out: firstly, self-regulation maximises industry flexibility — it allows for easy adjustment by industry participants to changes in the nature of the industry or occupation; and secondly, self-regulation reduces the need for and the cost of government resources spent administering a regulatory framework.¹⁷

¹⁵ See Scheffman & Appelbaum, "The Regulation of Quality" in *Social Regulation in Markets for Consumer Goods*, Ontario Economic Council Research Studies, University of Toronto Press, 1982.

¹⁶ See Carrol & Gaston, "Occupational Restrictions and the Quality of Service Received: Some Evidence" (1981) 47(4) *Southern Economic Journal* 959; Phelan, *Regulation of the Television Repair Industry in Louisiana and California: A Case Study*, Washington DC, Bureau of Economics of the Federal Trade Commission, 1974.

¹⁷ However, at least some of the costs will be transferred to the profession.

Table 5.1

Potential Advantages and Disadvantages of Self-Regulation

Advantages of industry made and enforced rules	Disadvantages of industry made and enforced rules
<p>They are more likely to be observed because they are made by those to whom they apply.</p> <p>They utilise the insiders' expertise and experience in the formulation of codes or agreements.</p> <p>They can be more responsive and flexible than regulation with changes and updating occurring more often.</p> <p>They can allow for innovative behaviour of industry participants.</p> <p>They have the agreement of major industry participants and therefore awareness and compliance is likely to be higher.</p> <p>They provide a market solution for the regulation of ethical behaviour.</p> <p>They are cheaper for governments to develop and monitor as those being regulated bear the cost of regulating.</p> <p>They may provide a dispute resolution mechanism, via independent arbitrators, the ombudsman, or industry councils.</p>	<p>There are no legal remedies for breaches of industry developed codes.</p> <p>They could be used to promote anti competitive behaviour.¹⁸</p> <p>They impose monitoring cost which are incurred by the industry or professional association.</p> <p>Compliance may be low if a sense of commonality amongst those affected is not present.</p> <p>They may implicitly create barriers to entry.</p>

However, for self-regulation to be successful:

- there must be sufficient power and commonality of interest within an industry to deter non-compliance; or
- the cost of non-compliance must be small.

Neither of these criteria are satisfied with respect to surveying:

- while the industry appears well organised through the ISA and the CSA, the existence of a significant fringe of small (often sole practitioner) surveyors in the ACT means that it is difficult to ensure compliance; and
- the risks associated with poor cadastral surveying are so significant that self-regulation is not an appropriate regulatory approach.

While self-regulation is not appropriate as a general response to the current licensing regime for surveyors, in certain circumstances it may be reasonable to rely on self-regulation as a complement to other regulatory tools.

5.2.2 Negative Licensing

A negative licensing scheme is one which removes the licensing restriction altogether, and permits a person to conduct authorised surveys without any formal test of practical or professional competence. However, under negative licensing the Government still retains the authority to withdraw the right to practise if that person subsequently fails to meet minimum professional standards of work and conduct.

Negative licensing can take two forms — where there are:

¹⁸ Since the *Competition Policy Reform Act 1995* all sectors of the economy are subject to the *Trade Practices Act 1974*. Any anti-competitive self-regulatory codes would need to be authorised under the *Trade Practices Act 1974*.

- no entry requirements necessary to get a licence (ie, just sign up); or
- restrictions on entry based on certain negative characteristics (eg, serious criminal convictions) rather than specification of any positive requirements for licensing (eg, educational requirements).

Advantages of negative licensing may include:

- lower compliance costs — negative licensing imposes fewer costs on participants which should result in lower prices for consumers;
- lower administrative costs — whilst the Government would still incur some continuing administrative costs under a system of negative licensing, compared to costs required to maintain a system of ‘positive licensing’ there would probably be a small net saving to the Government;
- lower entry barriers — costs of entry are lower, and dominant industry bodies can not seek to restrict competition by setting too stringent conditions of entry; and
- the ability to ‘punish’ contraventions of practice regulations — while registration alone may not ensure high quality, the threat of licence revocation may be enough to provide professionals with the incentive to provide high quality service. In essence, this would amount to a system of free entry and enforced exit.

In comparison, the potential disadvantages of negative licensing include:

- as no positive screening occurs the number of inappropriate participants initially entering an industry may be higher than under a registration process;
- some surveyors may be able to operate undetected or act inappropriately before they are detected. That is, licence removal will only occur after the detection of a breach. This is potentially a significant disadvantage given the importance of the Cadastre; and
- enforcement activities may need to be increased, thereby increasing monitoring costs.

Parties to the review expressed concern about the fact that a contravention of the practice regulations would be necessary to revoke a licence. It was generally thought that this approach cannot be justified given the significance of the Cadastre. Also, there was some concern, similar to that raised if there were no licensing regime at all (see section 5.1.2), that negative licensing would not allow ACT surveyors to practice in other Australian jurisdictions without meeting the full licensing requirements in each particular jurisdiction.

5.2.3 Co-Regulation

Co-regulation is a system of government regulation in which administrative responsibility is handed over, to a greater or lesser degree, to the surveying industry itself — see Box 5.1 (next page).

In the ACT a co-regulatory system could be structured so that:

- the ACT Government would issue requirements for licensing and practice regulations; and
- the licensing of cadastral surveyors could also be undertaken by the ISA(CD);
- alleged contraventions of the *Act* could be investigated by the ISA(CD), and possibly even decided by the ISA(CD) in the first instance; and
- the operations of the ISA(CD) could be monitored by the ACT Government.¹⁹

¹⁹ To see how such a supervisory arrangement works in the Victorian co-regulatory regime for lawyers see The Allen Consulting Group, *Restrictions on the Availability of Clerking Services: A Competitive Analysis*, Report to the Victorian Legal Ombudsman, 1998.

Co-Regulation in Practice — South Australia

South Australia (SA) has regulated cadastral surveying by means of a co-regulatory system since 1 January 1993.

The South Australian system separates responsibility for the professional side of surveying from the practising side. SA's 'Licensing Board' is administered by The Institution of Surveyors (SA). The Institution has been given the statutory responsibility for the licensing and registration of cadastral surveyors including the investigation of complaints for unprofessional conduct. The SA Government, through the Minister and the Surveyor-General, is responsible for issuing regulations and monitoring compliance with the survey practice standards contained therein. The Surveyor-General undertakes audits to ensure compliance.

In discussions the SA Surveyor-General remarked that he has heard significant criticism regarding the operation of the SA regime, but notes that no-one from other jurisdictions in Australia has ever approached him directly to enquire about the efficacy of the SA system. Furthermore, he noted that SA moved to such a system because it was seen as more compatible with the small number of surveyors licensed in SA (approximately 200).

Source: Discussion with the SA Surveyor-General

Potential Costs of Co-Regulation

All parties to the review expressed concern about the possibility of moving to a co-regulatory regime.²⁰ Some of the reasons given were:

- to ensure that there was not under-enforcement the Government would probably have to underwrite the legal costs associated with the ISA(CD)'s enforcement of the *Act* and regulations. However, this could create a situation of 'moral hazard' as it could encourage 'excessive' litigation by the ISA(CD);
- the ISA(CD) could use its regulatory powers to raise entry barriers or exclude parties in an anti-competitive manner;
- there is the risk that specific interest groups within the ACT surveying industry could use their influence over the new co-regulatory body to protect existing commercial interests;
- it would be unlikely that fees would be reduced as the ISA(CD) would and the Government would seek to recover costs;
- consumers may view a disciplinary process administered by the industry to be less independent and transparent than a Government-administered complaints mechanism; and
- there is significant concern about the ability of the ISA(CD) to cope with the burden of formal regulatory responsibility. For example, Williamson comments that:

membership of the ISA has not kept pace with population growth and the increased numbers of surveying graduates. Unfortunately many surveying graduates are working in related areas and particularly in the spatial information areas and are not identifying with or joining the ISA.

Williamson, "The Future of the Surveying Profession — An Australian Profession" (1997) 51(4) *GEOMATICA* 387.

This observation, and the high average age of ISA(CD) members suggests that there may not be sufficient growth in membership to guarantee that the membership can be a viable and representative regulator over the longer term. Even the ISA(CD) expressed concern that its membership was not sufficiently large and that it was under-resourced to adopt some form of formal regulatory responsibility.

²⁰ The interesting point, however, is that many of the objections raised regarding co-regulation can also be applied to the operations of the current Board (particularly given that members of the ISA(CD) are automatically appointed to the Board).

Potential Benefits of Co-Regulation

The principal benefit of co-regulation is that it harnesses the industry's desire to be regulated and puts the onus on the industry to take on more responsibility.

A co-regulatory approach need not lessen standards — the Government's ongoing need to provide certainty of land and property boundaries in support of guaranteed tenure can be protected by establishing surveying the ground-rules.

While co-regulation is often hailed as a more cost-effective form of regulation, in many cases the cost savings are to the government (ie, the cost of maintaining the operations of the Board would be eliminated), but such costs would, in practice, simply be transferred to the profession and then on again to consumers.

5.2.4 Certification

One of the most common alternatives to licensing is certification. Under a certification regime anyone is allowed to practise a particular occupation, but formal certificates of competency are provided to those who surveyors who desire them and can meet the necessary standards.

Certification standards tend to be similar to those in place under a licensing regime. Under a licensing arrangement, however, only those individuals who meet the requirements are allowed to practice; certification does not preclude practice by non-certified professionals.

Certification has a number of advantages over licensing. One of the most important benefits of certification, as opposed to licensing, is that it allows consumers greater freedom of choice. An individual could choose either a (presumably) lower priced non-certified surveyor, or a (presumably) higher priced certified surveyor. Friedman strongly supports the freedom to chose under a certification regime:

If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business.

Friedman, "Occupational Licensure", in *Capitalism and Freedom*, Chicago, 1962, pp.137–160 at p.149.

A system of certification, however, is not necessarily a desirable alternative to licensing:

- like licensing, mandatory entry requirements for a certificate may not increase service quality if they focus on inputs (such as education levels);
- certification may not lessen quality problems associated with externalities.²¹ A consumer who chooses a non-certified surveyor, for example, may not take into account the possible effect of his or her quality decision on others (eg, the risk that the survey will cause problems for third parties); and

²¹ Wolfson, Trebilcock & Tuohy, "Regulating the Professions: A Theoretical Framework", in Rottenberg (ed), *Occupational Licensure and Regulation*, Washington DC, AEI, 1980, p.205.

- certification may be undesirable when the costs of an inaccurate assessment of quality is high. As a certification regime provides no information on the quality of non-certified surveyors, a consumer may not know if the service of an uncertified surveyor is acceptable or extremely poor. If a consumer chooses a non-certified surveyor who is incompetent, a consumer could incur significant costs. The argument against certification in this case, however, neglects the fact that the individual can choose either a certified surveyor with a lower risk of poor quality or a non-certified surveyor with a higher risk of poor quality. Unless the consumer is unaware of the increased risk associated with non-certified surveyors, the individual that chooses the lower priced, higher risk, non-certified surveyor must prefer this option. Such an informed consumer would be worse off under a regulatory framework, such as licensing, that did not allow choice.

5.2.5 *Monitoring the Quality of Outputs*

To avoid the ambiguous quality effects that stem from mandatory entry requirements, it may be appropriate to implement a system of professional service (output) monitoring. Such a system would set standards of competence, monitor to insure compliance with standards, and penalise professionals who fail to comply. The aim of such a regime would be to lessen surveyors' incentives to engage in undesirable activities. Output monitoring may also be used in conjunction with licensing, certification, or registration.

The effectiveness of output monitoring, however, is dependent on the degree to which regulators:

- can (and do) monitor outputs; and
- apply appropriate penalties for non-compliance.

Output monitoring can be costly to administer in comparison to certification and licensing. A staff must be employed (either directly or by contracting out the work) to monitor the performance of surveyors.²²

However, the costs associated with monitoring surveyors in the ACT should not be too significant because:

- given the declining number of plans lodged in the ACT each year — see Figure 3.1 — it would not require too many audits to provide an adequate level of oversight; and
- a screening process (similar to the 13 point test currently applied to plans under the *Districts Act*) can be used to determine plans or surveyors that may embody problems. This targets the oversight at particular problems and hence increase the effectiveness of the monitoring.

Quality monitoring can be used in conjunction with a number of different options. Its advantage is that it directs government oversight at the actual service being delivered rather than factors that have only a (possibly weak) link with the quality of surveying. Hence, if there is a move to quality monitoring it is reasonable to expect that other forms of regulation can be lessened with no decrease in the integrity of the Cadastre.

5.3 **Conclusion**

A number of key points can be drawn from the above discussion:

²² The Chief Surveyor estimates that an audit of a plan may take between one and two days (depending on the complexity of the plan itself).

- licensing does not guarantee the integrity of the cadastral system — specification of inputs (ie, licensing requirements) provides no guarantee that output will meet a desired standard;
- negative licensing is not considered appropriate because of the risk to the Cadastre inherent in allowing at least one breach of standards;
- co-regulation is not considered feasible because of the increasing age of the membership of the ISA(CD) and its diminishing membership base;
- some minimal form of licensing may be appropriate to ensure the effective operation of cross-border recognition of ACT surveyors. This minimal entry standard could be supplemented by industry certification if the industry so feels the need;
- the regulatory regime, rather than focusing on licensing, should focus on the outputs (ie, the quality of the survey work itself). While a quality monitoring program can be expensive, such costs are not likely to be unreasonable because:
 - a screening process (similar to the 13 point test currently applied to plans under the *Districts Act* and the *Survey Practice Directions*) can be used to determine plans or surveyors that may embody problems; and
 - the small number of plans in the ACT means that a random audit does not need to include many plans to cover a significant portion of activity.
- The precise number of audits will need to be determined on a risk management basis. Given the small number of plans lodged each year, and the underlying accuracy of the system to date, the number of audits would not be likely to be significant, but could be increased if indications were that problems were developing;
- in shifting the regulatory focus from licensing to performance it is probably appropriate to also shift the cost recovery focus solely from licensing to also encompass the presentation of plans.²³ Thus, in addition to a (reduced) charge for licensing, the recovery should come from:
 - plan lodgement; and
 - recovery of audit costs where a surveyor fails an audit.²⁴

RECOMMENDATION TWO

The ACT should retain a licensing scheme for surveyors who wish to lodge cadastral plans.

RECOMMENDATION THREE

A screening process should be developed by the Chief Surveyor to highlight those plans that may need further scrutiny to ensure their compliance with Survey Practice Directions.

RECOMMENDATION FOUR

Plans lodged with the Chief Surveyor should be audited if the screening process suggests that there may be underlying problems with the plan, and otherwise on a random basis.

RECOMMENDATION FIVE

The cost recovery emphasis should be moved from almost total reliance on licence fees to also include recovery of costs associated with the lodgement of plans and the undertaking of failed audits.

RECOMMENDATION SIX

²³ A licence fee remains necessary to capture those surveyors predominantly engaged in redefinition surveys.

²⁴ While cost recovery should probably reflect the full cost of undertaking the audit, such a recovery mechanism would be likely to result in industry pressure on the Chief Surveyor to undertake smaller scale audits even when it is in the community's interests to do undertake larger scale audits. As a result, it may be administratively simpler and more efficient to recover the costs associated with audit failures through set penalties or fines that achieve full cost recovery over the longer term.

Where an audited plan 'fails' the cost of the audit should be recovered from the registered surveyor who lodged the plan.

6

Chapter Six

Licensing Criteria

Chapter Six

Licensing Criteria

Given that the previous chapter expressed in principle support for the retention of a licensing scheme, this chapter looks at the appropriateness of current licensing requirements (both what is necessary to get a licence and some reasons that may result in a licence being revoked).

6.1 Educational Criteria

Educational requirements are the most common criteria applied in occupational regulation.

6.1.1 *The Need for Post-Graduate Training*

Tertiary educational qualifications are generally seen in the community to be the minimum necessary requirement to gather the basic skills in a range of professions. The value of the tertiary training was not questioned by any participant to the review.

In addition to a surveying degree, licensing under the *Surveyors Act* requires the holder of a basic surveying degree seeking a surveyors licence to complete an additional 24 months of supervised training. The award of the certificate is based on successful completion of examinations, now administered by the NSW Board of Surveyors.

The mandatory requirement for a survey graduate to complete a further 24 months of practical training and pass additional examinations has the potential to deter graduates from entering the field of cadastral surveying. For example, Williamson notes that there is an increasing proportion of surveying students who do not progress to receiving a cadastral license:

One of the most informative indicators for the health of the profession in many countries has been the number of surveying graduates who seek registration to practise as a cadastral surveyor with a surveyors registration board. In Australia in the 1970s, about 90% of graduates were registered nationally, with this reducing to about 50% in the 1980s and about 30% in the 1990s, with the trend in some states being much less. The profession's traditional cadastral surveying base continues to contract.

Williamson, "The Future of the Surveying Profession — An Australian Profession" (1997) 51(4) *GEOMATICA* 387. References omitted.

All parties to the review, however, stressed that the low salary expectations of graduates — see Figure 3.4 — was a significantly greater deterrent to entry than the need to undertake an extra two year's practical training. However, this view appears to contrast with that of the Commonwealth Department of Employment, Education, Training and Youth Affairs which, when looking at the NSW surveying profession (which includes the ACT for its purposes), stated that:

Demand for *Surveyors* has also increased markedly over the last year due to growth in building activity. While demand is firm in several branches of the profession, the most significant shortages are currently for *registered Land Surveyors*. About three years of post-graduate training and work experience is required to become a registered Land Surveyor and this restricts supply. Moreover, increasing demand in areas that do not require registration, such as engineering, computerised geographic information systems and land management, has diverted some of the potential new supply from the land surveying specialisation.

Department of Employment, Education, Training and Youth Affairs, *Skills in Australia — Trends and Shortages*, Analysis and Evaluation Division, Analytical Series No. 98/5, AGPS, Canberra, 1998, p. 37. Emphasis in the original.

Other potential disadvantages associated with such a restriction include:

- the need for the ACT Government to fund costs incurred by the Chief Surveyor in participating in the NSW examinations process; and
- increased direct and indirect personal financial costs for the graduate surveyor undertaking the practical training.

In contrast, the claimed advantage of such a restriction is that it ensures survey graduates achieve minimum professional standards after graduation. However, as noted in section 5.2.2., regulation of input criteria is not necessarily a guarantee of output quality.

6.1.2 *Alternatives to Post-Graduate Training*

Formal Post-Graduate Education

Many professions (eg, legal and medical) have traditionally imposed additional practical training on top of tertiary degrees. There has, however, been a general (but not necessarily absolute or uniform) move away from such on-the-job training to formal post-graduate qualifications.

The benefits of using tertiary institutions to further develop graduates' cadastral skills are:

- uniform transmittal of skills — students receive uniform skills training, whereas with on-the-job training there is the view that smaller firms provide inferior training environments;
- formal qualifications — at the end of the year's practical training a graduate surveyor may decide to pursue other career paths, but has no formal qualifications to which he or she can point;
- operates on a user pays basis — the student pays for the education through HECS (rather than employers subsidising students);
- increased access for students who may wish to become surveyors — in theory the number of graduate surveyors receiving training is limited by the capacity of the existing firms to take on graduates. Under post-graduate training newly qualified surveyors can be created at a rate that represents future growth prospects rather than current growth.²⁵
- While Queensland has adopted post-graduate education as an option, the ISA(CD) was fairly dismissive of the quality of students attracted to this approach.
- Given that there is no tertiary institution in the ACT that teaches a surveying degree, this option is only likely to be feasible for the ACT if done in conjunction with other jurisdictions.

²⁵ The growth of post-graduate legal education is one factor that has increased the supply of lawyers dramatically over the past decade.

Self-Regulation and Certification

It was suggested during consultations that the surveying profession is likely to support a need for a level of experience and training not currently being provided by universities in their undergraduate courses.

The question that then arises is, given the industry's appreciation of the need for further training, why should the Government be required to stipulate further training? An alternative approach is to rely on minimal tertiary qualifications and then allow the industry to apply any additional educational criteria at its choosing.

This approach is commonly employed in various professional fields (eg, accounting and engineering).

While some parties to the review have expressed concern that certification undertaken by industry creates the environment for discriminatory and restrictive (gatekeeping) practices because of vested interests, this concern lacks weight given that:

- the *Trade Practices Act 1974* reduces the ability of industry bodies to act in a restrictive manner;
- barriers to entry are lowered because it would not be mandatory for a new surveyor to seek certification (although it may ultimately be in his or her interests); and
- there is already the potential for the industry to act as a gatekeeper because of industry's role in formulating entry criteria and enforcing the *Survey Practice Directions*.

6.1.3 Conclusion

Stipulation of a basic skills set is important when setting minimum licensing criteria. The difficult task is to determine the appropriate level of skills, and then how best to enforce such a skill requirement.

While the industry protests that practical training is important for the development of a competent surveyor, it has not demonstrated the need for Government to set such a high entry standard. With a move to auditing of plans, it is unlikely to threaten the integrity of the Cadastre if the required minimum educational criteria necessary to attain a licence is lowered to a tertiary surveying degree, with any extra requirements the responsibility of the industry through certification.

While this approach is somewhat out of step with other jurisdictions, and may threaten the current system of reciprocity with other jurisdictions, the national mutual recognition system ensures that:

- ACT surveyors will be able to obtain a licence in other jurisdictions; and
- surveyors registered in other jurisdictions will be able to obtain a licence in the ACT.

RECOMMENDATION SEVEN

An appropriate surveying degree from a tertiary institution should be retained as a criteria for licensing.

RECOMMENDATION EIGHT

The current post-graduate requirements administered by the NSW Surveyors Board should no-longer be mandatory for the attainment of a surveyors licence in the ACT.

RECOMMENDATION NINE

If industry believes that post-graduate training is necessary then it should be encouraged to develop certification procedures (either by piggy-backing on current post-graduate training requirements or developing its own).

6.2 Other Initial Criteria

In addition to educational criteria, s.17 of the *Surveyors Act* states that:

- (1) The Board shall authorise the registration of a person as a surveyor-
 - (a) if he or she satisfies the Board that he or she is not less than 18 years of age;
 - (b) if he or she satisfies the Board that he or she is a fit and proper person to be registered as a surveyor; ...

sub-s.17(1) *Surveyors Act 1967*.

While the original intent behind such criteria may have been well-intentioned, such licensing criteria are difficult to justify under NCP.

Firstly, while it is difficult to imagine a person attaining the required tertiary qualifications prior to turning 18 years of age, it does not seem appropriate to treat them differently to someone over the age of 18. While the argument may be that ‘adult’ judgement is necessary to appropriately undertake a survey, such judgement can be assessed by the screening and auditing of plans as discussed in section 5.2.5.

Secondly, the ‘fit and proper person’ test is very subjective to the point where it serves no real purpose. The approach adopted by the Surveyors Board has been to require two referees to vouch for potential surveyors. This is such a low threshold that no-one has ever been refused licensing on the basis of sub-s.17(1)(b). However, the discretion available creates potential concerns in that it could be used for anti-competitive purposes to exclude potential new entrants. If there is thought to be a need to exclude people because of the behaviour it might be better to establish, as is often done in negative licensing regimes (see section 5.2.2), discernible negative criteria (eg, conviction for a serious criminal offence) as grounds for not granting a licence.

RECOMMENDATION TEN

Licensing criteria related to the age and general character of potential surveyors should be removed from the Surveyors Act.

6.3 On-Going Licensing Criteria

6.3.1 Character Standards

One of the concerns of good regulatory policy is to weed out provisions that do not address the over-riding objective of the legislation. In the case of the *Surveyors Act*, it is reasonable to query those provisions that do not directly relate to ensuring the quality of survey work.

Sub-section 25(1) of the *Surveyors Act* provides that:

- (1) The Board may order the removal from the Register of the name of a person-
 - (a) whose registration has been obtained by fraud or misrepresentation;
 - (b) who is convicted, whether in the Territory or elsewhere, of an offence punishable by imprisonment for 1 year or longer or of any other offence which, in the opinion of the Board, renders him or her unfit to practise as a surveyor;
 - (c) who is convicted of an offence against this Act;
 - (d) who is convicted of an offence against any other law in force in the Territory relating to the duties and functions of surveyors or matters incidental to surveys;
 - (e) whose name is, otherwise than at his or her own request, removed from a register of surveyors or like record kept by a reciprocating board;

- (f) who becomes of unsound mind;
- (g) who is deemed by the Board to be guilty of-
 - (i) habitual drunkenness or addiction to a narcotic drug;
 - (ii) allowing a person, other than a registered surveyor, to practise in his or her name as a surveyor; or
 - (iii) (iii) directly or indirectly giving or offering or agreeing to give or offer to a person any valuable consideration for securing or attempting to secure for the registered surveyor employment or work as a surveyor;
- (h) who certifies to the accuracy of a survey knowing it to be inaccurate;
- (i) who wilfully or by culpable negligence or through incompetence makes, or causes to be made under his or her supervision, a survey that is so inaccurate or defective as to be unreliable;
- (j) who contravenes, or fails to comply with, a direction given under this Act by the Board; or
- (k) who ceases to hold the qualifications by reference to which he or she was registered.

Sub-s.25(1) *Surveyors Act 1967*.

While these provisions all appear reasonable to some extent, it is necessary to ask:

- how the criteria ensure the integrity of the Cadastre;
- why criteria, if they are important, are not also part of the initial licensing criteria;²⁶ and
- whether the criteria are too vague to expect that enforcement would be instigated.

It would be unlikely that the integrity of the Cadastre would be threatened, particularly with an increased emphasis on quality oversight, if a number of criteria from sub-s.25(1) were removed from the *Act*. Particular criteria that can probably be removed relate to the mental health of surveyors and their addictions.

RECOMMENDATION ELEVEN

Sub-section 25(1) of the Surveyors Act should be amended to remove criteria not directly related to the practice of surveying. Particular criteria that should be abolished relate to the mental health of surveyors and their addictions.

6.3.2 Continuing Professional Development

The MoU with NSW — see section 8.2 and Appendix C — certainly anticipates the ACT introducing a requirement that continuing professional development (CPD) be undertaken as a requirement for surveyors to retain their licence.

There were mixed views about the need for mandatory CPD:

- the advocates of mandatory CPD argued that it was necessary to ensure that surveyors retain up to date skills. For example, the Chief Surveyor claimed that mandatory CPD in NSW has improved the quality of surveyors;
- those in opposition tended not to be opposed to CPD, but instead were opposed to *mandatory* CPD. The concerns were that:
 - if CPD were mandatory it would become a chore rather than a real learning exercise; and

²⁶ It would be strange if one were eligible for a licence and then, because of a different set of criteria, could have their licence immediately withdrawn.

- that individuals have sufficient incentive to maintain their skills because maintenance and development of new of skills is necessary in a competitive marketplace.

If CPD were to be made mandatory, to be consistent with NCP the only mandatory component should relate to training or education on elements that are related quite specifically to cadastral surveying. That is, CPD should not relate to more general issues such as accounting skills.

In any case, the case for government intervention to require CPD does not seem justified. For example, the CSA already has mandatory staff CPD as a requirement of member firms. Legislating or regulating for mandatory CPD seems to unnecessarily duplicate already existing market incentives.

RECOMMENDATION TWELVE

The Government should not legislate to require that continuing professional development training be mandatory to retain a surveyors licence.

6.3.3 Mandatory Professional Indemnity

In some ways the debate with respect to mandatory professional indemnity (PI) insurance is similar to that for mandatory CPD.

There is a strong argument that says that given the potential financial risks associated with imprecise surveys — whether by fraud, negligence or otherwise — PI insurance may:

- protect consumers;
- protect the Government if it, in effect, indemnifies the Government guarantee of title; and
- protect firms.

Again, the issue is not the merit of PI insurance, but whether it should be made mandatory. Given that both providers and consumers of surveying services benefit from PI insurance there is a strong incentive for it to be provided. Indeed, both the ISA(CD) and the CSA thought that all active surveyors had PI insurance.

If PI insurance is made mandatory then the issue turns on what level of PI insurance to require. Failure to establish a minimum level of PI would smack of tokenism, yet actually establishing a minimum level of PI insurance would create a barrier to entry for smaller (possibly part-time or occasional) surveyors.

Given that there appears to be significant incentive for surveyors to have PI insurance, and significant incentive for consumers to demand that a surveyor have PI insurance, there is insufficient need for Government to make PI insurance a mandatory requirement for surveyors.

RECOMMENDATION THIRTEEN

The Government should not legislate to require that surveyors hold professional indemnity insurance to retain a surveyors licence.

7

Chapter Seven

The Role of the Surveyors Board

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The Role of the Surveyors Board

The Surveyors Board currently undertakes two roles:

- the development of the *Survey Practice Directions*; and
- adjudicating in disciplinary matters.²⁷

7.1 Concerns Regarding the Board

7.1.1 The Composition and Role of the Board

Section 6 of the *Surveyors Act* sets out the composition of the Board:

(1) The Board shall consist of the Chief Surveyor and 5 other members who shall be appointed by the Minister. ...

(3) Two of the members of the Board shall be persons appointed from a panel of three registered surveyors who are nominated by the Institution of Surveyors, Australia, Canberra Division.

(4) At least 2 of the remaining members of the Board shall be persons who are registered surveyors.

s.6 *Surveyors Act 1967*.

There are two intertwined concerns that emanate from s.6:

- the right of an identified industry association to appoint members; and
- the number of surveyors on the Board.

The first concern arises because not every cadastral surveyor is a member of the ISA(CD), and in any event, there is what could reasonably be called a rival industry association.²⁸ At the very least, the privileged position afforded to the ISA(CD) should be removed.

The second concern is more general. As most occupational licensing boards tend to be dominated by members of the occupation they are regulating it is reasonable to infer the capture theory of regulation — incumbent firms will seek to dominate the regulatory agency because each individual firm stands to gain more than any consumer or potential entrant stands to lose.²⁹ As a result:

²⁷ Until recently licensing was also a function, which has now been assumed by the NSW Board of Surveyors.

²⁸ While the ISA has personal members, the CSA has corporate members.

²⁹ Friedman, "Occupational Licensure", in *Capitalism and Freedom*, Chicago, 1962, pp.137–160; Moore, "The Purpose of Licensing" (1961) 4 *Journal of Law and Economics* 93; Rottenberg, "The Economics of Occupational Licensing," in *Aspects of Labor Economics*, National Bureau of Economic Research, Princeton, 1962, pp.3–20; Stigler, "The Theory of Economic Regulation," (1971) 2 *Bell Journal of Economics and Management Science* 3.

Although the professions may seek to benefit consumers, the possibility of a conflict of interest exists. The regulators, in many cases, have a financial interest in the profession they are regulating. Since professionals' self-interest may not coincide with the public's best interest, many have come to regard self-regulation with growing skepticism.

Cox and Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, Federal Trade Commission, 1990, p.1.³⁰

Capture may manifest itself in the:

- creation of regulations — theoretical findings indicate that professionals do have an incentive to limit entry by setting entry requirements that are too high.³¹ The self-regulated profession may also have an incentive to enact anti-competitive business practice restrictions or rules governing the conduct of members; and
- the enforcement of regulations — the discipline process is often controlled by members of the profession,³² which may lead to distorted incentives for enforcement. Violations of anti-competitive business practice rules could increase competition and lower incomes for members of the profession. Since professionals could be economically worse off when a member of their profession violates anti-competitive rules, professionals on disciplinary boards may have an incentive to prosecute individuals who violate these rules. These disciplinary boards could vigorously enforce anti-competitive business practice rules,³³ but not enforce rules designed to maintain quality within the profession.

7.1.2 *The Size of the Board*

A further concern relates, not so much to NCP concerns, but to concerns regarding the efficacy of a board for such a small industry. While a statutory board with significant overheads can be relatively easily justified for larger industries, a board of six members could be considered excessive when there are only about 40 regularly practising surveyors.

7.2 **Options to Address these Concerns**

7.2.1 *Liberalisation of Board Membership*

As noted in section 7.1.1, at the very least, the privileged position of the ISA(CD) should be removed from the *ACT*. Where specialist knowledge is required the Minister could issue invitations for people to nominate suitable surveyors.

³⁰ Gellhorn takes a sociological view when suggesting that practitioners of various trades come to consider themselves professionals, equal to doctors and lawyers, and flatter the traditional professions by imitating their governing structures and regulations — Gellhorn, "The Right to Make a Living," in *Individual Freedom and Government Restraints*. Louisiana State University Press, 1956, pp.105–151.

³¹ See Shaked & Sutton, "The Self-Regulating Profession" (1981) 48 *Review of Economic Studies* 217; and Leland, "Quacks, Lemons and Licensing: A Theory of Minimum Quality Standards" (1979) 87 *Journal of Political Economy* 1328.

³² Young, *The Rule of Experts: Occupational Licensing in America*, Washington DC, Cato Institute, 1987, p.41.

³³ Wolfson, Trebilock & Tuohy, "Regulating the Professions: A Theoretical Framework" in Rottenberg (ed), *Occupational Licensure and Regulation*, AEI, Washington DC, 1980, p.203.

In addition, public membership on regulatory boards may be effective in reducing the number of potentially anti-competitive restrictions. For example, at least one study on the effect of public members on licensing boards found that public members were, “effective in reducing the number of nonsense requirements that limit entry into the four health occupations studied.”³⁴ ‘Nonsense requirements’ — requirements related to morality, age, and residency/citizenship — were termed as such because they did not appear to have been related to the quality of service provided.

7.2.2 *Reduction in the Size of the Board*

Given concerns about the size of the Board in comparison to the industry one option could be to reduce the size of the Board.

There are two strategies to achieve this option:

- reduce the number of Board members to three. This option was recommended in the 1997 Chief Surveyor’s *Directions Paper*,³⁵ or
- combine the ACT Surveyors Board with the NSW Board of Surveyors. This would achieve economies of scale, with the amalgamated Board presiding over more than 1000 members.

The option of reducing the size of the Board to three members appears to have general support from the industry. This option is let down because it does not address the concerns associated with regulatory capture.

The advantages of the second option would be to allow greater coordination of cross-jurisdictional issues. However, there is concern from the industry that this may lead to a reduced autonomy for ACT-specific concerns and representation. Other problems with this approach include:

- the problems inherent with a board comprised of surveyors remains;
- there may be legal complications associated with a cross-jurisdictional body; and
- funding disciplinary actions may be problematic — depending on how funding is provided there may be a moral hazard problem. For example, if the ACT funds disciplinary actions instigated by the NSW Board or a joint Board with majority NSW representation then there may be an incentive to over-enforce the profession in the ACT and under-enforce the profession in NSW.

7.2.3 *Transferral of Investigative and Disciplinary Functions to Other ACT Bodies*

One way to structure a system is to rely on the Chief Surveyor to investigate alleged or suspected contraventions of the *Surveyors Act* and the *Survey Practice Directions*.

Once the Chief Surveyor’s investigation is completed there exist two alternative policy options:

- provide the Chief Surveyor with the power to make a decision, with a right of appeal to the Administrative Appeals Tribunal of the ACT (AAT). To reduce the incentive to appeal, the *Survey Practice Directions* should be restructured and graded to provide for demerit points. More closely matching the penalty with the cadastral-related risks associated with the contravention will likely reduce the incentive to appeal; or

³⁴ Graddy & Nichol, “Public Members on Occupational Licensing Boards: Effects on Legislative Regulatory Reforms” (1989) 55(3) *Southern Economic Journal* 610 at 623. The health care professions examined in the study were physicians, chiropractors, registered nurses, and licensed practical nurses.

³⁵ Menzies, *Directions Paper: Review of the Surveyors Act 1967 & Districts Act 1966, 1997*, p.2.

- the Chief Surveyor should then pass on the results of his or her investigation to ACT prosecutors, and then litigated if the prosecution believes that the case is sufficiently strong. Appeals would then proceed through the court system.

7.2.4 Conclusion

Drawing on the discussion from the previous sections, Table 7.1 identifies and assesses four broad options against the current approach embodied in the Surveyors Board.

Table 7.1

Criteria for Choosing a Disciplinary System

	Current Arrangements	Liberalise Board Membership	Reduce Board Size	Chief Surveyor as Investigator	Chief Surveyor as Decision-Maker
Independence and impartiality	May be seen as compromised because of the privileged position of the ISA(CD) and the numerical domination of surveyors on the Board	May somewhat increase the impartiality of the Board, depending on the number of non-surveyors	Depending on the composition of the smaller Board this option may increase or decrease impartiality	Impartiality significantly increased as the investigation is separate from the decision to prosecute	Impartiality increased because the Chief Surveyor's role as regulator is clear
Efficiency and effectiveness	Not effective as there is an incentive for under-enforcement	May improve effectiveness somewhat but no change to efficiency	Efficiency may improve but no change to effectiveness	Efficiency and effectiveness are likely to be significantly improved	Effectiveness and efficiency may improve slightly
Openness and accountability	Openness provided by a community representative and significant industry representation	Increases openness and accountability	May be seen to reduce openness and accountability	Accountability is enhanced because the investigation is separate from the decision to prosecute, but is correspondingly reduced because appeals are only through the courts	Openness and accountability ensured through appeals to the AAT (ie, not reliant on the courts)
Proper funding and resources	Constraints on effective enforcement exist because of the threat of actions being appealed through the courts at great expense	No reduction in current constraints	Funding constraints possibly reduced by having lower Board expenses	Funding constraints reduced by having a single decision-maker and shifting the burden of prosecution to an impartial decision-maker	Funding constraints reduced by having a single decision-maker and shifting appeals to the AAT (ie, not reliant on the courts)
Ranking	<i>Fifth</i>	<i>Third</i>	<i>Fourth</i>	<i>Second</i>	<i>First</i>

It is clear from Table 7.1 that there is no perfect option; each option represents a trade-off between a range of factors.

The option that appeals most under NCP is that which involves the Chief Surveyor enforcing the *Survey Practice Directions*, and advising the Minister on the creation and amendment of the *Survey Practice Directions*.

In consultations it was clear that the industry favoured the retention of the Surveyors Board with its current powers, but would countenance a reduction in size.

The industry expressed concern regarding options that provided significant power to the Chief Surveyor. In particular:

- there was concern that the position was subject to departmental second-guessing because the Chief Surveyor was not a statutory position reporting directly to the Minister; and
- while the current Survey General has good experience and judgement, concern was voiced that there is no guarantee that the industry would be exposed to problems associated with the idiosyncrasies and weaknesses of a single person.

The first concern can be addressed directly by upgrading the independence of the Chief Surveyor.

The second concern can be reduced in a number of ways:

- firstly, by requiring that the *Survey Practice Directions* be made by the Minister on the recommendation of the Chief Surveyor only following the publication of a regulatory impact statement (RIS) such as the ACT's Regulatory Needs Analysis or the Business Impact Assessment. The Commonwealth Office of Regulation Review has described the benefit of a RIS process in this way:

Determining whether regulation meets the dual goals of 'effectiveness' and 'efficiency' requires a structured cost-benefit approach to policy development. The relevant problem to be addressed and subsequent policy objective should be identified as a first step in the policy development process, followed by consideration of a range of options (including no action) for achieving the objective.

... In this regard, preparation of a Regulation Impact Statement (RIS) is a critical feature of the regulation making process, primarily because preparation of a RIS formalises and evidences the steps that should be taken in policy formulation. It helps to ensure that options to address a perceived policy problem are canvassed in a systematic, objective and transparent manner, with options ranked according to their net social benefits. The RIS embodies this analytical process.

Office of Regulation Review, *A Guide to Regulation*, AGPS, Canberra, 1997, p.A1.

A RIS process that incorporates a formal consultation stage, as all good RISs do, allows the industry to assist in policy formation and alerts the industry to impending change and provides it with time to approach the Minister directly;³⁶

- secondly, the Chief Surveyor should be on an employment contract (possibly three to five years). This reduces the chance that the position of Chief Surveyor will be captured indefinitely with a person who is not suitable for the position; and
- thirdly, the Minister could consider creating a non-statutory advisory committee (sometimes called an industry reference group) to advise him or her on the need to revise the *Survey Practice Directions*, or comment on proposals for change suggested by the Chief Surveyor. While this may formalise a consultation process for the surveying industry, and hence provide a check against the powers of the Chief Surveyor, it is not necessary for such a body to have statutory authority.

RECOMMENDATION
FOURTEEN

The position of Chief Surveyor should be made an independent statutory position reporting to the Minister.

RECOMMENDATION FIFTEEN

The Chief Surveyor should be appointed on a fixed term contract.

RECOMMENDATION SIXTEEN

Amend the Surveyors Act to abolish the Surveyors Board.

RECOMMENDATION
SEVENTEEN

The Board's disciplinary responsibilities should be transferred to the Chief Surveyor.

RECOMMENDATION
EIGHTEEN

Appeals from decisions of the Chief Surveyor should be made to the Administrative Appeals Tribunal of the ACT.

³⁶ It was made quite clear in a number of consultation meetings that the industry will exert direct political influence if it believes the issue is important enough.

*RECOMMENDATION
NINETEEN*

Survey Practice Directions should be made by the Minister on the advice of the Chief Surveyor. Recommendations to the Minister should be accompanied by a regulatory impact that clearly states the level of public consultation undertaken in the development of the standards and stipulates the views of the major parties.

8

Chapter Eight

Inter- Jurisdictional Issues

Chapter Eight

Inter-Jurisdictional Issues

8.1 Acceptance of Qualifications from Other Jurisdictions

The *Surveyors Act* is quite different to many other schemes of occupational licensing in that it establishes, in effect, a scheme for recognition of qualifications from other jurisdictions:

The Board may enter into a reciprocal arrangement with the surveyors board or other competent authority in any part of Her Majesty's dominions for the recognition of the status of a person registered, licensed or authorised by the board or other competent authority to practise as a land surveyor in that part, and for his or her registration as a surveyor under this Act.

sub-s.18(1) *Surveyor's Act 1967*

In general, good regulatory policy suggests that legislation should not be duplicative, with regimes relying on generally applicable laws where-ever possible. The following sections consider whether s.18 is duplicative of the national mutual recognition scheme.

8.1.1 Recognition of Surveyors from Within Australia

The ACT has adopted the national mutual recognition scheme through the introduction of the *Mutual Recognition (Australian Capital Territory) Act 1992*. In effect, mutual recognition:

aims to remove barriers to the free flow of goods and labour that can arise from differences in regulations in each state or territory. Mutual recognition involves each jurisdiction recognising regulations created and administered by other jurisdictions, even where such regulations vary from their own rules and regulations. Therefore, it ensures that ... members of registered occupations can now enter an equivalent occupation in other states and territories.

Mutual recognition is based on the premise that regulations and standards covering goods and occupations in one state or territory meet community expectations and should be acceptable in other jurisdictions.

Office of Regulation Review 1997, *Impact of Mutual Recognition on Regulations in Australia*, AGPS, Canberra, p.1.

Currently under mutual recognition the process of registration is automatic and does not require the applicant to demonstrate knowledge of legislation in the ACT, only that he or she has *bona fide* credentials in a participating jurisdiction and pay the ACT licensing fee. If registration has not been granted in four weeks then the recognition is automatic by virtue of the mutual recognition legislation.

At least with respect to domestic situations, the mutual recognition regime replicates s.18. This assumes, however, that s.18 is used to acknowledge qualifications in other jurisdictions. However, while s.18 allows the Board to withdraw arrangements for recognition, the mutual recognition scheme makes it mandatory to accept licensed surveyors from other jurisdictions. This mandatory nature removes the Board's ability to withdraw arrangements on potentially anti-competitive grounds.

A potential concern with relying on mutual recognition in place of s.18 is that there is no guarantee that states or territories will continue to participate in the mutual recognition scheme. For example, Western Australia has adopted mutual recognition under its *Mutual Recognition (Western Australia) Act 1995* with the condition that it must be extended every year to have ongoing effect.

In such circumstances,³⁷ it would be said that there would only be partial coverage, with parties forced to register in both the ACT and the other jurisdiction. Partial occupational coverage is a barrier to trade:

many occupations are ‘partially registered’ with registration required in some — but not all — jurisdictions. Mutual recognition does not enhance the mobility for people from jurisdictions where there are no registration requirements, because they have no registration from their home state which may be recognised in another. Therefore, partially registered occupations can create a major impediment to the creation of a national labour market.

Office of Regulation Review 1997, *Impact of Mutual Recognition on Regulations in Australia*, AGPS, Canberra, p.17.

While this is a potential problem, it is a problem inherent in the domestic mutual recognition scheme. While it does no harm to provide reciprocating regulation in addition to mutual recognition, it would send the wrong signals were jurisdictions second-guess the effectiveness of the mutual recognition scheme.

8.1.2 Recognition of Surveyors from New Zealand

Similar to the operation of the domestic mutual recognition scheme, the *Trans-Tasman Mutual Recognition Act 1997* provides for mutual recognition with New Zealand. Again, this general scheme should be relied upon in preference to an opt-out scheme such as s.18 of the *Surveyors Act*.

8.1.3 Recognition of Overseas Surveyors

While sub-s.18(1) provides for reciprocal arrangements with overseas jurisdictions, such arrangements are limited to jurisdictions within the Commonwealth.

The CSA noted that Australia’s reputation for high quality cadastral systems has encouraged a number of Asian countries to develop similar cadastral regimes. As such, they suggested that the limitation to Commonwealth countries is overly restrictive and should be changed to jurisdictions anywhere.

This approach accords with a number of consensus conclusions that developed from the Third OECD Workshop on Professional Services:

- Discrimination against foreign professionals and investors should be avoided;
- Market access should be based on transparent, predictable and fair procedures.

Organisation for Economic Co-operation and Development, *The OECD Report on Regulatory Reform — Volume 1: Sectoral Studies*, OECD, Paris, 1997, p.136.

Rather than being prescriptive a simple checklist approach could be used to determine whether overseas qualifications are comparable to the ACT’s qualifications. Such a checklist should not go much beyond asking whether:

- tertiary surveying qualifications of a broadly comparable standard; and
- whether a cadastral system similar to the ACT’s exist in the overseas jurisdiction.

³⁷ Other circumstances may involve the jurisdiction abandoning licensing altogether or adopting a negative licensing scheme. While this would cause problems under mutual recognition, it is also likely that, under s.18, the Board would revoke the reciprocal arrangement.

If there is a concern about the overseas qualifications or training then it may be appropriate, in extreme circumstances, to recognise overseas qualifications and then audit the first survey plan.

RECOMMENDATION TWENTY

Section 18 should be amended to:

- *reduce overlap with the domestic and trans-Tasman mutual recognition schemes; and*
- *provide the Chief Surveyor with the power to recognise qualifications gained in jurisdictions outside of Australia and New Zealand where such qualifications are considered sufficiently compatible with the ACT's.*

RECOMMENDATION TWENTY-ONE

The Chief Surveyor should, in consultation with the industry, develop clear guidelines to assist in determining which overseas qualifications are compatible with the ACT's.

8.2 Inter-Jurisdictional Cooperation

In recent weeks the Board of Surveyors of NSW and the Surveyors Board of the ACT have signed a Memorandum of Understanding (MoU) regarding cooperative arrangements between the two boards — the MoU is replicated in full in Appendix C.

The MoU is a significant development in its acknowledgment that the ACT's location (surrounded by NSW) and small scale means that innovative regulatory structures and processes are necessary.

The MoU puts in place procedures whereby:

- there will be a process that facilitates joint registration — joint registration is a single step with a single invoice and a discount on obtaining two separate licences;
- there will be a single register of surveyors;
- the ACT will cease examining candidates for Registration, but the ACT Surveyor general will assist in the examination of students under the NSW Board's auspices;
- the NSW *Chief Surveyor's Directions for Survey Practice* will be expanded to include an ACT supplement; and
- the Boards have made a commitment to align other procedures (disciplinary procedures, requirements for continuing professional development, etc) where possible.

While the ACT does not have many candidates, and possibly would have none in most years given that a recognised surveying degree is not available in the ACT, the cost of examinations per student is relatively high. For example, in 1996 the Chief Surveyor claimed that, "The cost of examination of a graduate through to registration is approximately \$5,000."³⁸

The moves to greater harmonisation are to be applauded as a pro-competitive step. However, care needs to be taken to ensure that this move to harmonisation does not inhibit pro-competitive reform by indirectly reinforcing an unsatisfactory *status quo* in the ACT, or exporting an unsatisfactory *status quo* from NSW to the ACT.

RECOMMENDATION TWENTY-TWO

That the laudable efforts to increase harmonisation of the regulation of cadastral surveyors in the ACT and the NSW not be used to stifle the development of more efficient and effective regulatory structures.

³⁸ ACT Chief Surveyor, *Discussion and Options paper: Review of the Surveyors Act 1967 and Districts Act 1966*, 1996, p.2.

8.3 Development of a National Profession

One result from NCP reviews has been to encourage thinking about the development of national professions in place of fragmented regulation:

Regulatory differences within and between levels of government can add unnecessarily to the costs of Australian business, which is operating increasingly on a national level. This is clearly the case for a range of professions. Facilitation of a national market for professional services and the minimisation of regulatory inconsistencies across jurisdictions has been of particular concern to the Australian Council of professions.

Brockington, "The National Competition Policy and the Review of Professions Regulation" presented to the 39th *Australian Surveyors Congress*, Launceston, 10 November 1998, p.9.

In the case of cadastral surveying a national approach would involve:

- costless inter-jurisdictional registration; and
- individual state and territory functions being delegated to a national industry body.

For a jurisdiction as small as the ACT there may be some economies of scale that could be achieved by passing responsibility to a national body.

While moves to create a national profession should be viewed positively, a cautionary note is also appropriate. In some cases the professions themselves see the development of a national profession as a means of thwarting competitive reform. For example, development of a national approach may be a response to a single jurisdiction proposing to lower entry standards and hence, through mutual recognition, lowering entry standards nationally. Any moves to create a national practice should ensure that the regulations proposed constitute 'minimum efficient regulation' and are not surreptitiously used to thwart competitive reforms.

*RECOMMENDATION
TWENTY-THREE*

The creation of a national profession should be encouraged as long as such a move is not used to entrench regulatory arrangements that are difficult to justify on NCP grounds.

9

Chapter Nine

Technical Standards

Chapter Nine

Technical Standards

Currently technical practising standards are included in the *Survey Practice Directions* accompanying the *Surveyors Act*. This chapter explores the appropriateness of setting technical standards, and then, rather than analysing the appropriateness of each particular standard, provides an overview of the principles to apply when developing or assessing such standards.

9.1 When Should Standards be Specified?

There is now significant academic agreement on the principles that should be used to guide when minimum quality standards may be appropriate. The broad principles are set out in Table 9.1.

Table 9.1

Broad Criteria to Determine Whether Quality Standards Are Necessary		
Market Structure	Other Characteristics	Case for Standards
Perfect competition	No externalities Information symmetry	No case
Perfect competition	No externalities Information asymmetry	Minimum quality standards may be required, but <ul style="list-style-type: none"> information is costly so some degree of ignorance is likely to be optimal; secondary markets in information provision may develop without government intervention; and suppliers may provide signals to buyers regarding quality (eg, warranties)
Monopoly	No externalities Information asymmetry	Quality may be under-provided but minimum quality standards may not be the best policy response — market structure may need to be changed or made contestable
Any structure	Information asymmetry with large information acquisition and transaction costs	Government may reap economies of scale in ascertaining product quality and monitoring/enforcing quality standard
Any structure	Externalities Information symmetry	Minimum quality standards may internalise external effects
Any structure	Product compatibility is necessary	Product compatibility standard is required, but whether derived from markets or government regulation needs to be considered on a case-by-case approach

Source: Department of Premier and Cabinet, *National Competition Policy: Guidelines for the Review of Legislative Restrictions on Competition*, Melbourne, Victorian Government, 1996, p.64.

In the case of surveying:

- externalities exist — because the risks to third parties are not internalised by those purchasing or supplying surveying services; and
- information asymmetry is unlikely to be significant (ie, there is information symmetry) — because the purchasers of surveying services are likely to be repeat purchasers.

In addition, it could be argued that there is a compatibility issue that requires the establishment of standards. To provide some level of comparability when assessing plans it is reasonable to expect that the approach by which they are developed follow the same guidelines.

This suggests that there is a case for the ACT Government to proscribe minimum practice standards.

9.2 How Should Standards Be Incorporated?

There are three main types of standards:

- principles-based — these describe the objective sought in general terms and require interpretation according to the circumstances;
- performance-based — these standards specify the desired outcome in precise terms but allow individuals to determine their own technique for achieving the outcome; and
- prescriptive — these specify the technical means for attaining the specified outcome.

It is important that the *Survey Practice Directions* incorporate the most appropriate type of practices standard in the circumstances.

Prescriptive standards are geared towards the typical or average firm. As a result, they do not account for the variability of compliance costs across regulated parties and they focus attention on one means of solving a problem while other factors which may have a more significant impact in achieving the objective are overlooked.

However, the benefit of a prescriptive standard is that it encourages certainty for those being regulated and for those whose role it is to determine whether the standard has been met. However, this increase in certainty, relative to the other types of standards, implies reduced flexibility for surveyors to meet regulatory objectives and can therefore reduce innovation.

A prescriptive standard therefore is most applicable and suitable when there are limited ways of achieving a desired objective and when the problem that the standard addresses is a static one. In these cases, certainty may be more important than flexibility.

In other cases where there may be various solutions to a problem, a more flexible approach may be preferable and a performance or principles-based standard could be more effective:

- performance and principles-based standards allow regulated parties to work out the most cost-effective way of achieving the desired objective; and
- performance based standards are best suited to cases where the objective is easily quantifiable. This provides an obvious yardstick by which to judge whether the objective has been attained.

A

Appendix A

Review of the Surveyors Act 1967 — Terms of Reference

*Appendix A***Review of the *Surveyors Act 1967* —
Terms of Reference**

The *Surveyors Act 1967* provides for the registration of land surveyors and for the regulation of the practice of land surveying in the ACT. The review will be undertaken by an independent consultant supported by a Secretariat located in the ACT Department of Urban Services.

The Consultant shall undertake a review of the *Surveyors Act 1967* and all subordinate legislation under the Act in accordance with the principle set out in Clause 5(1) of the *National Competition Principles Agreement 1995* that:

“...legislation (including Arts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that: (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition”.

Without limiting the scope of the review, the Consultant should examine the following:

- the need to ensure the integrity of the Cadastre and the capacity of the ACT Government to guarantee land title;
- the roles and responsibilities of the Surveyors Board, the Chief Surveyor and the Registrar of Surveyors;
- the need for surveyors to be registered in order to practise and associated issues of ongoing professional development and assessment;
- the impact of prescribed minimum technical specifications and standards of practice on business and on the potential for innovation;
- the directions of regulatory reform generally in other Australian states and the Northern Territory in relation to land surveying; and
- the potential for interjurisdictional cooperation in the regulation of land surveying.

In undertaking the review, the Consultant may take into consideration the results of consultations with the ACT surveying profession which occurred between 1996 and 1998 on directions for reform of the legislative framework regulating land surveying. It will be necessary to augment this consultative process through meetings with the Institution of Surveyors, Australia (Canberra Division), the ACT’s Registrar-General, the NSW Surveyor General and ACT users of surveyor’s services. The Consultant may also be required to meet with officers responsible for competition policy reform in the Chief Minister’s Department.

The Consultant shall prepare a report which:

- describes and clarifies the objectives of the legislation and the specific features of the existing legislative framework;
- describes the land surveying profession and industry regulated by the legislation;
- identifies the nature of the restrictions on competition including any potential inconsistencies with the *Trade Practices Act 1974* in relation to specific provisions in the *Act*;
- analyses the likely effect of the restrictions on competition;

- assesses and balances the costs and benefits of the restrictions taking into account where relevant the matters set out in Clause 1(3) of the Competition Principles Agreement;
- considers alternative means for achieving the same result including non-legislative approaches (consistent with the Regulatory Needs Analysis process set out in the ACT Government's Manual for Regulatory Reform); and
- makes recommendations for reform options.

The report should be presented in a manner consistent with the Urban Services NCP Legislation Review Guidelines: Generic Structure of Reports.

The Consultant will be supported by a Review Secretariat comprised of (1) the Manager of the Competition Policy Reform Unit in the Department of Urban Services; and (2) the ACT's Chief Surveyor. The Manager of the Competition Policy Reform Unit will have primary responsibility for the coordination of the review. The Chief Surveyor will provide any necessary technical advice and information.

The Consultant will provide the Review Secretariat with a:

- Draft review report by 5.00 pm, Monday, 7 December 1998.
- Final review report by 5.00 pm, Thursday, 23 December 1998.

B

Appendix B

Consultation

Appendix B

Consultation

Part of the NCP process requires consultation with interested parties. The precise extent of consultation depends upon the nature of the subject under review. Informal discussions were held with bureaucrats in other jurisdictions to ascertain regulatory trends elsewhere in Australia. In addition, the parties listed in Table B1 were explicitly consulted on the appropriateness of the *Surveyors Act* under NCP.

Table B1

Consultation	
Organisation	Representatives
Master Builder's Association	Mr Mike Harding National Technical Director
Registrar General	Mr John Malouf Registrar General
Surveyor-General's Department, NSW	Paul Harcombe Deputy Surveyor General John O'Keefe
Chief Surveyor	Rod Menzies
Chief Minister's Department	Ian Primrose Manager, National Competition Policy
Australian Consulting Surveyors, Canberra Division	David Sloan Chairman Peter Wilden Allan Mail
Institution of Surveyors Australia, Canberra Division	Keith Bell President Doug White Federal Councillor Peter Daly Executive Officer

Note: In addition, terms of reference were supplied to the HIA and two committees of the ACT Law Society, with the offer to discuss the issues if they so desired.

A number of parties within the Department of Urban Services and the Chief Minister's Department were provided copies of a draft report and were given the opportunity to comment. Comments were incorporated, where appropriate, within this final report.

C

Appendix C

Cooperation Between the ACT and NSW Surveyors Boards

ppendix C

Cooperation Between the ACT and NSW Surveyors Boards

This chapter sets out the provisions of the Memorandum of Understanding between

- the Board of Surveyors of New South Wales; and
- the Surveyors Board of the Australian Capital Territory;

for cooperative arrangements between the two boards.

1. OBJECTIVE

This Memorandum of Understanding will formalise arrangements between the Boards and assist the development of further cooperative initiatives.

2. DEFINITIONS AND ABBREVIATIONS

Joint Registration - Registration of a Surveyor in both NSW & ACT where a single (joint) fee is paid.

Primary Jurisdiction - The jurisdiction nominated by a Surveyor, holding Joint Registration, as the jurisdiction where he/she predominantly practises or lives.

Secondary Jurisdiction - The other jurisdiction

MOU - Memorandum of Understanding

CPD - Continuing Professional Development

3. SCOPE

This MOU sets out the agreements and protocols for cooperation and joint activity between the two Boards.

4. CURRENCY OF MOU

The MOU will commence on the date of signature and will continue unless replaced by a new MOU or terminated by either Board upon twelve months notice.

5. ROLES AND RESPONSIBILITIES

Each Board will continue to operate as an independent body under its own legislation

Wherever possible, and specifically as set out in **6.** below, the Boards will conduct joint activities and cooperate on mutually beneficial initiatives.

6. INITIATIVES COVERED BY THIS MOU

6.1 Joint Registration of Surveyors

Where a surveyor is registered in both jurisdictions and seeks Joint Registration he/she will be invoiced a single, combined fee by the NSW Board. The NSW Board will then forward the appropriate portion of the fee to the ACT Board.

The Joint registration fee will be agreed by both Boards in December of each year for the ensuing financial year. Payment of the joint registration fee is to be regarded as the same as paying separate fees to each Board.

Where letters of accreditation are required for joint registrants they will be provided by way of letters only, ie no certificate and hence no fee. In due course each Board will have electronic access to the Combined Register to confirm accreditation.

Persons from other jurisdictions seeking joint registration through reciprocal arrangements should apply through the appropriate primary jurisdiction.

6.2 Combined NSW/ACT Register of Surveyors.

The Boards have agreed to develop a single electronic register of Registered Surveyors in both jurisdictions. The combined register will have the capability of searching for ACT only, NSW only and joint registrations. Joint registrations will be further divided as to primary jurisdiction.

Each jurisdiction will have online access to the combined register. Single registration maintenance will be carried out by the appropriate jurisdiction. Joint registration maintenance will be carried out by the NSW Board as custodian of the combined register and supported by prompt notification of any change to register details within each jurisdiction.

The combined register will be developed by NSW and on line by 1 January 1999

6.3 Examination of Candidates

The Boards agree to jointly examine candidates for registration as Land Surveyors. The ACT Board has ceased setting its own examinations and will provide an examiner to participate in the NSW process.

The ACT will participate in NSW's annual training workshop for enrolled candidate surveyors.

The NSW Board agrees (subject to normal conditions) to accept, in addition to NSW Registered Surveyors, ACT only Registered Surveyors as accredited, supervising surveyors in training agreements. The ACT Board will be a party to training agreements involving ACT Registered Surveyors and will take a lead role in the management of those agreements.

6.4 Continuing Professional Development

The ACT proposes to introduce CPD, as a requirement for registration renewal, in legislation currently being prepared. ACT CPD requirements will initially mirror those of NSW.

The Boards will negotiate and agree on any changes to CPD so as to maintain identical requirements.

There is no distinction between cadastral points gained in either jurisdiction.

6.5 Survey Practice Manual

The NSW “Surveyor General’s Directions for Survey Practice” will be expanded to include an ACT “Supplement”. The ACT will progressively prepare sections for the ACT “Supplement” which will be published by NSW as part of the Surveyor General’s Directions.

When the ACT “Supplement” is substantially completed, the Boards agree to issue combined directions, providing that this can be done within the constraints of NSW legislation.

6.6 Administrative Procedures

The Boards will continue to review and, where appropriate, combine administrative procedures.

6.7 Disciplinary Procedures

Disciplinary procedures will, within the constraints of individual legislation, be aligned as much as possible.

6.8 Further Initiatives

The Boards will actively pursue further initiatives to promote joint activity and cooperation.

7. FINANCIAL ARRANGEMENTS

The Boards will initially operate on a “quid-pro-quo” basis. It is acknowledged that while NSW will bear the major administrative costs, ACT will provide a guest examiner at NSW exams and a participant at the Kurri Kurri workshops.

Financial arrangements for cooperative initiatives will be reviewed by both Boards from time to time.
